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No. 2405

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. DREW CAMINETTI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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Filed

OCT 17 1914

F. D. Monckton,
Clerk.

Filed this.....*day of October, 1914.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

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OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error, F. Drew Caminetti, was indicted and convicted in the District Court of the United States, in and for the Northern District of California (First Division), Honorable William C. Van Fleet presiding at the trial, for a violation of the Act of Congress of June 25, 1910 (36 Stat., 825), designated, in section 8 of the Act, as the "White-slave traffic Act".

The indictment contained four counts. After a trial lasting several days, the plaintiff in error (hereinafter designated as the defendant) was convicted on the first count, and acquitted on the other

three counts, of the indictment. Motions for a new trial and in arrest of judgment were denied. The defendant was sentenced to imprisonment in the Federal penitentiary at McNeil's Island, State of Washington, for the term of eighteen months and fined in the sum of \$1500.00. From the judgment of conviction, he prosecutes this writ of error.

As above stated, the defendant was indicted on four counts, the first two counts being for violations of section 2 of the Act of June 25, 1910, designated as the "White-slave traffic Act",* and the last two counts being for violations of section 3 of that Act. The first count of the indictment (the only count upon which the defendant was convicted) charged him with having, on the 15th of January, 1913, at *Sacramento*, State and Northern District of California, transported and caused to be transported, and aided and assisted in obtaining transportation for, and in transporting in interstate commerce, from Sacramento, in the State and Northern District of California, to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific, one Lola Norris, for the purpose of debauchery and for an immoral purpose, to wit, that the said Lola Norris should be and become the concubine and mistress of the defendant Caminetti. (See Indictment, Transcript of Record, p. 2.)

The second count charged him with a similar offense as to one Marsha Warrington, there being,

* Note: We append, for convenience, as an addendum, the complete text of the "White-slave traffic Act".

however, this difference: the second count alleged that the immoral purpose was that the said Marsha Warrington should be and become the concubine and the mistress, *not* of the *defendant Caminetti*, but of one *Maury I. Diggs*.

The third and fourth counts charged the defendant with having persuaded, induced and enticed Lola Norris, in count three, and Marsha Warrington, in count four, respectively, to go from Sacramento California, to Reno, Nevada, for an immoral purpose, to wit, that the said Lola Norris should become the concubine and mistress of the defendant, and the said Marsha Warrington should become the concubine and mistress of Maury I. Diggs.

The defendant was acquitted of having had anything to do with the transportation, in violation of section 2 of the "White-slave traffic Act", of Marsha Warrington, and was also acquitted of having persuaded, induced or enticed either Lola Norris or Marsha Warrington, in violation of section 3 of the Act, to accompany him on the trip from Sacramento, California, to Reno, Nevada. The jury, by its verdict, in effect found and decided that the departure from Sacramento, California, of Lola Norris and Marsha Warrington with the defendant Caminetti and Maury I. Diggs was voluntary on their part and of their own free will and accord, and not through any persuasion, inducement or enticement on the part of the defendant.

It will be conceded by the prosecution, at the outset, that the case at bar is devoid of the slightest element or feature of commercialism.

By this, we mean to say that there is not the slightest pretense in the case at bar, based on anything in the evidence, that the defendant ever intended to profit financially by reason of his escapade with Lola Norris or that he ever contemplated that she should become a prostitute or be debauched by him with the intent or purpose that he should ever receive any of her earnings as a prostitute.

The prosecution excited national attention, partly because it was considered, in view of the facts elicited at the trial, as a test case of the scope and operation of the "White-slave traffic Act"; partly because of the prominence, politically and socially, in California of defendant's father and mother; and partly because of certain political aspects injected, or attempted to be injected, into the case at its inception.

The government retained as special counsel to prosecute Hon. Matt I. Sullivan and Mr. Theodore J. Roche, eminent members of the bar of the State of California.*

The trial lasted several days and was vigorously contested. Numerous exceptions were taken to the rulings of the Court admitting and rejecting evidence, to remarks and comments of the Court itself,

* Note: Hon. Matt I. Sullivan has since taken his seat as Chief Justice of the Supreme Court of California, by appointment from Governor Hiram W. Johnson, in succession to the late Chief Justice W. H. Beatty.

to many portions of the opening and closing arguments of the special counsel for the prosecution, to the instructions of the Court in charging the jury and to the failure of the Court to give instructions requested on behalf of defendant, as well as in overruling the demurrer to the indictment, in denying the motion to instruct the jury to acquit and in denying the motion in arrest of judgment. The assignments of errors are numerous. Only the principal ones of these will be referred to and relied upon to obtain a reversal.

An examination of the evidence, contained in the bill of exceptions (Transcript of Record, pp. 143-411) will make it difficult to conceive how the jury ever arrived at its verdict of guilty on the first count of the indictment and ever could have found, *beyond all reasonable doubt*, that the defendant transported, or caused to be transported, or aided or assisted in obtaining transportation for, or in transporting, Lola Norris from Sacramento, California, to Reno, Nevada, in interstate commerce, for any immoral purpose whatsoever. The evidence absolutely fails to show that the defendant did anything either to transport, or to cause the transportation, or to aid or assist in obtaining transportation, for Lola Norris. The evidence shows that it was Maury I. Diggs who bought the ticket for Lola Norris. The defendant did not purchase a single ticket; he did not furnish any of the money with which the ticket for Lola Norris was actually purchased, nor did he agree to repay any money advanced by Diggs. He

did not purchase the Pullman ticket for Lola Norris, nor did he contribute a cent to its purchase. All this was done by Maury I. Diggs. The indictment did not charge the defendant with a conspiracy with Maury I. Diggs to violate the "White-slave traffic Act". There is absolutely no evidence of any act done by the defendant, under the first count of the indictment, to support his conviction either as a principal or as an accessory, and the motion to acquit should have been granted, or, thereafter, the motion in arrest of judgment.

We challenge the learned and astute prosecuting attorneys to point out, in their Reply Brief, one act of a material, tangible or substantial character which the evidence shows that the defendant did to (1) transport, or (2) cause to be transported, or (3) aid or assist in transporting, in interstate commerce, Lola Norris, from Sacramento, California, to Reno, Nevada. As already stated, the defendant was not on trial for a conspiracy to violate any law of the United States, and yet his conviction on the first count of the indictment can be reconciled on no other theory than that the jury considered, under the rulings and remarks of the trial Judge, the act of Diggs in buying the tickets, both railroad and Pullman, as the act of the defendant Caminetti, upon the false and erroneous theory that they acted in concert. The trial Judge, in his rulings and remarks and instructions to the jury, undoubtedly gave rise to this erroneous view and misled the jury into the false notion that the prosecution was, in

effect, one for conspiracy, and that the act of Diggs was the act of Caminetti. Nothing could have been more misleading and erroneous! Nothing more fallacious and prejudicial to the defendant Caminetti!

Furthermore, the testimony of Marsha Warrington and of Lola Norris and of the defendant himself show that the intent and purpose—the actuating motive—in leaving Sacramento was absolutely at variance and totally inconsistent with the intent and purpose denounced by the “White-slave traffic Act” and alleged against the defendant in the indictment.

The indictment alleged that the immoral purpose and intent was, “to wit, that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant”. (Transcript of Record, p. 2.)

Marsha Warrington’s testimony was totally inconsistent with any such intent or purpose. She testified as follows:

“Q. You did not use that language. Were you asked this question, reading from page 381 of Miss Warrington’s testimony, of the previous trial, a question put by the Court: ‘Q. He is asking you whether Mr. Diggs said in his talks with you in any specific way that he wanted you to go there for the purpose of living with him? A. No, he did not say that.’ ‘Was that question asked of you and did you make that answer?’

Mr. ROCHE. What page is that?

Mr. HOWE. Page 381.

The COURT. What is the object of this?

Mr. HOWE. I want to show why she went to Reno.

The COURT. She has not on this occasion testified that any specific suggestion of that kind was made.

Mr. HOWE. But I am asking her if any specific suggestion was made.

The COURT. You can ask her what they went to Reno for.

Mr. HOWE. Q. Was there any specific suggestion made by Mr. Diggs that you should go there for the purpose of living with him? A. No. He said he would get a divorce and marry me. *Mr. Diggs did not say to me at any time, that he wanted me to go over there for the purpose of living with him.*" (Transcript of Record, pp. 269, 270.)

The testimony of Lola Norris was absolutely at variance with any such intent or purpose. She testified as follows:

"Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody." (Transcript of Record, pp. 309, 310.)

The testimony of the defendant himself is utterly at variance and inconsistent with the intent and purpose set out in the indictment.

We set out the testimony of the defendant in full. We do so, for the convenience of the Court, in view of the fact that there is no printed transcript of record. His testimony is as follows:

“My name is F. Drew Caminetti. I remember having a conversation with Miss Marsha Warrington during the latter part of February, 1913, on ‘P’ Street in the City of Sacramento, with reference to a publication in the ‘Sacramento Bee’. She told me that a reporter on the ‘Sacramento Bee’, a Mr. Putnam, who I believe is the sporting editor of the ‘Bee’, had told her that another reporter had discovered that she and Lola Norris, Mr. Diggs and I were going around together and that he had written an article about it; that her friend Mr. Putman had used his influence and had the article suppressed; I asked her if she had acknowledged the fact to him and she said that she had. That was the first time I had heard anything about a publication in the ‘Bee’. In the latter part of February, 1913, I had a conversation with Mr. O’Brien relative to a statement made by Miss Warrington’s uncle, in which possible harm to me that might ensue was discussed. Mr. O’Brien told me that one afternoon Miss Warrington’s uncle, a man by the name of Baumgarten, I believe, had come into his place of business and inquired of Monte Austin, in his presence, if he knew that Marsha Warrington was going with Mr. Diggs, and Mr. O’Brien told me that Mr. Austin replied that he did not know for a fact that Miss Warrington was going with Mr. Diggs; Miss Warrington’s uncle then continued and said that if Mr. Warrington found out for a fact that Miss

Warrington was going with any married man, that he would kill him, and that if he found them together he would kill both of them. I believed that statement. I had a conversation with the same gentleman, Mr. O'Brien, at the Columbia Hotel, on March 3rd, 1913, relative to threats made by Mr. Diggs Sr. I had two conversations with Mr. O'Brien on March 3rd relative to remarks made by Mr. Diggs Sr. The first one was at Mr. O'Brien's place of business, during my lunch hour, about 12:30. At that conversation, Mr. O'Brien and I were together, were alone, I should say, and afterwards we went over to the Columbia Hotel where Mr. Diggs was and went over the conversation again. He told me—he called me up at my office first and told me that he wanted to see me. So I went up there. He told me that Mr. Diggs had come into the saloon looking for Maury and me, and that he had some policeman with him; he came in and said: 'Do you know where Maury is?' to Mr. O'Brien; Mr. O'Brien replied 'No, sir'. He said, 'I think you are a damned liar'. Mr. O'Brien said he didn't know where he was. Thereupon Mr. Diggs got very angry and excited and acted like a maniac and pounded his bar with his fist. He said that there was a bunch of people in Sacramento who were ruining his son, mentioning two girls and me, and that he intended to put a stop to it if he had to have everybody arrested, that if any other person sold liquor to Mr. Diggs he would have them arrested. That he was not going to stand having his son ruined by people who were exerting an evil influence on him as he thought. I believed that statement when it was told to me by Mr. O'Brien. Mr. O'Brien told me that there was a policeman in front of his place of business, and for me to come in the back way. After that I went to the Columbia Hotel, and there had a conversation with Mr. O'Brien, in

the presence of Maury I. Diggs. When I refer to Mr. Diggs as having been the party at the saloon, I mentioned Mr. I. P. Diggs. I believe at the Columbia Hotel Mr. O'Brien repeated for Mr. Diggs' benefit—Mr. Maury I. Diggs—what he had told me at the saloon, and we simply added a few comments of ours to it as to the likelihood of whether his father would do it or not. On Monday, March 3, 1913, I had a conversation with Mr. I. P. Diggs, the father of Maury I. Diggs, over the telephone. I was in the office in the State Capitol at that time. In the office of the State Board of Control. The phone bell rang. We had a buzzer system in the office there; there were 5 or 6 extensions and my signal on the buzzer rang and I answered the phone. The gentleman on the other end said 'Hello, is this Mr. Caminetti?' Do you want it verbatim or in substance? I can give it almost verbatim. 'Is this Mr. Caminetti?', and I said it was. 'This is Mr. I. P. Diggs of Berkeley; do you know me?' 'No, sir'. 'Do you know Maury Diggs?' 'Yes, sir'. 'I am Maury Diggs' father; do you know me?' I said 'How do you do, Mr. Diggs'. He said 'I came up here to see Maury, can you tell me where he is?' I said 'No, sir'; he said 'Well, I have reason to believe that you can'. I said 'You are mistaken'; he said 'Well, I came up here from Berkeley to get him, and I am going to get you too, I find that you boys are running around with two girls here and have been acting in a way that married men should not, that you are no fit man to work on the Board of Control, and I am going to let them know it; you are carousing and running around the country and not staying at home and not attending to your business; you are not a fit man to work there, and I am going to take steps to see that they find out about it'. There were five or six extensions, as I say, and I didn't want the members of the

Board of Control to hear that, and I said, 'You had better see me personally and say that to my face'. He must have taken that as a threat, because he said, 'Yes, God damn you, I will tell it to your face, and I will tell it to others, too', and he hung up the telephone. During that conversation Mr. Ford and Mr. Avery were in the office. I believe it was about 11 o'clock in the morning. I remember seeing Mr. Lesley, the uncle of Mr. Maury I. Diggs, on Monday evening, March 3rd. I had a conversation with him at that time. It took place in Mr. O'Brien's establishment. Mr. Lesley told me that he had seen Mr. Diggs that afternoon, that he was around town acting like a wild man, that he had policemen with him, that he had telephoned all around the country, to all the surrounding towns, mentioning particularly, I remember, Placerville and Stockton, and had notified the police in those towns that if they got hold of Maury Diggs to arrest him and hold him. He also told me that Mr. Diggs had made up his mind to have the two girls and myself and Maury arrested, that he was going to put Maury and me on probation. The two girls that Mr. Lesley referred to were Miss Warrington and Miss Norris. I know Mrs. Maury I. Diggs. I remember Mrs. Diggs calling me up over the telephone on Wednesday, Mar. 5, 1913. I was in Mr. O'Brien's place, at a little after 5 o'clock. I was called to the phone and a voice which I recognized as belonging to Mrs. Diggs said, 'Mr. Caminetti, for a long time you have been a snake to me, now I am going to show you what a real serpent is; I know that you and Maury have been going around with two girls, Marsha Warrington and Lola Norris, and I know the name you have been going under—Mr. Whitman; I am going to tell these girls' parents and you know what will happen to you.' I had been trying to in-

interrupt her as soon as I got the drift of what she was saying, but I could not; at that point, however, I succeeded, and I tried to point out to her that she should not do anything like that, that if she took a hasty action like that at that time, that later on she might repent it. I could not succeed in getting her to see anything of that kind. I finally succeeded in getting her to promise me that she would take no step in the matter until after I had a chance to talk to her in the matter; she said if I came out soon enough she would not do anything until she would see me. So I made an engagement for 7:30 that evening, and I went out there. When I got in the house, after she let me in, she repeated the remarks that she had made to me over the phone and then went deeper into it. She told me of several trips that Mr. Diggs and Marsha and Lola—Miss Warrington and Lola Norris and I had taken. She told me the things she had suffered through the fact that we had been going with these girls. She depicted to me the suffering my wife probably went through because we went with these girls, and told me that she was going to tell these girls' parents—she repeated that again—as the only way in which to break this up; that if she did that that I knew what would happen to me, that that would put an end to it all, that Mr. Warrington would probably shoot. I tried to persuade her out of that, at least I tried to dissuade her from seeing the girls' parents, but I could not succeed in getting that promise from her. About 8 o'clock Mr. Maury Diggs and Mr. Lesley came in and that put an end to the conversation; upon their entrance I got up and left the house and went down town. At that time I believed she would carry into execution the threats that she made. I believed what she said to me. I knew that she had the facts, had found out the facts in the case. Mrs. Diggs had been

greatly worried. She acted that evening as if she was capable of going to any length at all; she was very nervous and very excited. She had not had any sleep, she told me, during that week. That was the week when Mr. Diggs was hiding from his father. She told me she had not had any sleep, she was half crazy, and she intended to make me and these two girls suffer everything that she had suffered. I remember having been at the Peerless Restaurant on Saturday afternoon, March 8, 1913. I saw Maury I. Diggs there at that time. There were different people there at different times. Miss Norris and Miss Warrington were not there all the time. They were there during part of the time. I had a conversation with Maury I. Diggs in the Peerless Restaurant with reference to something his father had said to him while in San Francisco. The Peerless Restaurant is in the City of Sacramento on 9th Street between 'K' and 'L'. Miss Warrington was there when I got there and later on, just after I got there, Miss Norris came in. Mr. Diggs said, 'I have just come up from San Francisco and my father is coming up Monday to have you and Lola and Marsha arrested; he claims that you and Lola and Marsha are as much responsible for the position in which I am in as I am, and that he is going to put you three through everything I have gone through.' He said, 'I tried to keep him from coming up, but I could not, and he will be up here tomorrow morning.' That is about the substance of what he said. He went over it and enlarged upon it. I replied, 'Then, I am gone.' I meant that when Mr. Diggs got there to have me arrested that I would not be there, that I was going to get out of town. First Mr. Diggs said that if I went it would be necessary for him to go, and when he said that Miss Warrington said, 'I am going, too; I can't stay here if you leave.'

And Lola—Miss Norris—said that she could not go, although she hated to stay in Sacramento and face things she thought or knew were going to happen, but she could not leave. Thereupon Miss Warrington turned around and said, ‘Lola, I am going and you have got to go too.’ I believed the statements made by Mr. Diggs to me as having come from his father were true. I had already had a talk with him over the phone in which he said that same things, and by the tone of his voice I knew that he was extremely angry with me at that time, and from what Mr. Diggs said I gathered that his anger had grown. I told Miss Norris and Miss Warrington and Maury I. Diggs of the conversation I had had with Mr. Lesley, to which I have testified. Prior to the conversation at the Peerless Restaurant I told them about what Mr. Lesley had said.

Q. Did you ever read the White Slave Law?

A. No, sir.

Mr. SULLIVAN. Wait a minute. I object to that as immaterial.

The COURT. The objection is sustained. Let the answer be stricken out.

Mr. HOWE. We note an exception.

(There was no cross-examination of this witness.)” (Transcript of Record, pp. 402-407.)

The defendant was corroborated, in his testimony, by the evidence of Elizabeth Caminetti, his wife, Transcript of Record, pp. 395-398; by Lina Diggs, the wife of Maury I. Diggs, his companion, Transcript of Record, pp. 407-411; by I. P. Diggs, the father of Maury I. Diggs, Transcript of Record, pp. 394-395; by M. H. Diepenbrock, the owner of the Diepenbrock Building in Sacramento, where Maury I. Diggs had his offices as an architect, and to which

the defendant and Lola Norris repaired on several occasions, Transcript of Record, pp. 399-402; by P. J. O'Brien, a saloonkeeper in Sacramento, Transcript of Record, pp. 377-386; by Thomas J. Ford, a clerk in the State Board of Control, where the defendant was employed, Transcript of Record, pp. 374-377; by C. L. Avery, also employed as accountant in the State Board of Control, Transcript of Record, pp. 372-374; by D. T. Leitch, a chauffeur in Sacramento, Transcript of Record, pp. 365-372; by J. A. Putman, connected with a newspaper, the "Evening Bee", in Sacramento, Transcript of Record, pp. 363-364.

Finally, the evidence is uncontradicted that when the question first arose as to what they should do or how they should live after arriving in Reno, the defendant, Lola Norris, Maury I. Diggs and Marsha Warrington had passed the boundary line dividing the states of California and Nevada, and, in fact, had almost reached Reno. In other words, the evidence conclusively shows that if any intent and purpose was formed at all, it was first formed *long after* the furnishing of any transportation and first came into existence *after* they had crossed the boundary line dividing the states of California and Nevada and had almost reached Reno.

Argument.

I.

**The Act of Congress of June 25, 1910 (36 Stat. 825),
Designated as the "White-Slave Traffic Act", Is Un-
constitutional.**

(Transcript of Record, pp. 7, 45, 46, 47, 48, 30-33, 143; Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 10, 15, 17.)

This point is raised both on demurrer and motion in arrest of judgment. (Transcript of Record, pp. 7, 30-33.)

We presume, again, to advance this contention and to save the point, although we are aware that the Supreme Court of the United States has decided that the "White-slave traffic Act" is constitutional.

Hoke v. United States, 227 U. S. 308; 57 L. Ed. 523;

Athanasaw v. United States, 227 U. S. 326; 57 L. Ed. 528;

Bennett v. United States, 227 U. S. 333; 57 L. Ed. 531;

Harris v. United States, 227 U. S. 340; 57 L. Ed. 534.

We will not attempt, in view of the decisions of the Supreme Court of the United States, upholding the constitutionality of the "White-slave traffic Act", to do more than to state the points on which we rely in support of our contention that the

“White-slave traffic Act” is unconstitutional and infringes on the police power of the states.

The “White-slave traffic Act” is claimed to derive its constitutional sanction from subdivision 3 of section 8 of article I of the constitution of the United States, which provides that Congress shall have power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

We contend that “persons” are not subjects of commerce.

New York v. Miln, 11 Peters, 102; 9 L. Ed. 648;

License Cases, 5 How., p. 599; 12 L. Ed. 256;

Bowman v. Chicago & N. W. R. Co., 125 U. S. 489; 31 L. Ed. 700.

Congress has no power or authority to punish prostitution within the states.

Congress has no authority to legislate or to make a criminal act anything which may be done in a sovereign state by any person.

U. S. v. Warner, 188 Fed. 682.

The only power Congress has over any person is while such person is “*in transitu*”.

Lemon v. The People, 26 Barb., (N. Y.) 270;
aff. in 20 N. Y. 562.

Congress has not prohibited prostitutes from traveling.

The Supreme Court of the United States has repeatedly declared that commerce among the several states shall be “free and untrammelled”.

Welton v. State of Missouri, 91 U. S. 275;
23 L. Ed. 347;

Hall v. DeCuir, 95 U. S. 485;

Webber v. Virginia, 103 U. S. 344;

Passenger Cases, 7 Howard 283; 12 L. Ed.
702;

King et al. v. American Transportation Co.,
14 Fed. Cases 512;

Boyse v. Anderson, 2 Pet. 150; 7 L. Ed. 379.

Without further elaborating on this contention, we respectfully submit that the “White-slave traffic Act” is unconstitutional and infringes on the police power of the states.

II.

The Trial Court Erred in not Holding that the Facts Proved by the Prosecution, Assuming Them to be True, Did Not Constitute Such an Offense as was Intended by Congress to be Prosecuted by Virtue of the Act Known as the "White-Slave Traffic Act", nor Does the Prevention and Punishment of the Things Proven Fall Within the Scope of the Purpose for Which That Act Was Intended and Which the Defendant Is Charged with Having Violated, in That There Is No Evidence to Show That the Defendant Profited by, or Expected to, or Intended to, Profit, or Share in any Profit Ensuing or Arising in Pursuance of the Transportation Set Out in the First Count of the Indictment, Upon Which Defendant Was Convicted.

This question is raised by assignments of errors numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 17; (see motion to instruct the jury to acquit; also motion in arrest of judgment; Transcript of Record, pp. 30-33; 45, 46, 47, 48, 412-414).

These assignments of errors distinctly raise the proposition that acts of immorality, such as is claimed by the prosecution to have been established in the case at bar, are not within the letter or spirit of the "White-slave traffic Act".

This is, confessedly, not a case of commercialized vice. The first count of the indictment, upon which the defendant was convicted, does not allege facts of commercialism in the transportation of Lola Norris, or that defendant intended to profit thereby. It

does not charge that he is a "white-slaver". It does not set forth any facts which place him in the category of a "white-slaver". Lola Norris is not alleged to have been the victim of a "white-slaver" or "white-slave plot". It is merely charged that the purpose of the defendant, in the transportation, was that the "said Lola Norris should be and become the concubine and mistress of the defendant". There was not the slightest pretense, during the taking of the voluminous testimony, that the purpose of the defendant savored in the slightest degree of commercialism or that his conduct, in connection with the transportation of Lola Norris (assuming that he did anything to aid or assist in her transportation, which we deny), was anything more than an escapade or elopement. At its worst, it was the foolish amour of an impetuous and love-crazed young man, 24 years of age, with an equally rash young woman, 20 years old. Lola Norris, on the witness stand, confessed her intense affection for the defendant. Both lived in Sacramento, California, when they first met and during the period when their acquaintance ripened into terms of intimacy and mutual affection. She knew that he was married and that he had a family consisting of his wife and two small children. She was introduced to the wife and mingled with her at several social gatherings and dances. In spite of this awkward and compromising situation, she kept company with the defendant for several months previous to their flight from Sacramento, California, to Reno, Ne-

vada, and was on such terms of intimacy that upon several occasions she went on automobile trips with him, they remaining away together from their respective homes over night, during which occasions they occupied apartments together ostensibly as husband and wife. She, however, testified that her very first act of sexual intercourse did not take place until after their arrival at Reno. All this is disclosed by the evidence in the record. The evidence also shows that her acquaintance with the defendant was not forced upon her; that she met him secretly and clandestinely; that she enjoyed his company willingly, and requited his attentions; that she deceived her parents and kept the fact from them that she was associating with the defendant, or that he was married; and that, finally, fearful of the scandal, notoriety and disgrace which her association with the defendant, a married man with two small children, might cause and which she believed to be impending and about to become public property through the medium of a local newspaper, the "Evening Bee", and also fearing her probable arrest under the State Juvenile Law, she voluntarily and willingly accompanied the defendant and Maury I. Diggs and Marsha Warrington on the trip from Sacramento to Reno. There is not the slightest pretense that in all her actions she did not act willingly and of her own free will and accord. There was evidence that she was directly influenced in leaving Sacramento by the advice and pleadings of Marsha Warrington, although she her-

self denied this on the stand. But aside from this, the verdict of the jury, acquitting the defendant of having persuaded, or induced, or enticed either Lola Norris or Marsha Warrington to leave Sacramento, is conclusive, and sets at rest any controversy or question that might be made upon that score.

The evidence shows that similar motives actuated and impelled the defendant, as they did Lola Norris, in leaving Sacramento. Fear of disgrace, exposure, scandal, notoriety; loss of his public position; the wrath of the father of his companion, Maury I. Diggs, who blamed the defendant largely for the escapades of his son and the neglect of his family, which, the defendant feared, might result in bodily harm to him from the hands of Diggs' father as well as Marsha Warrington's father; the animosity and threats of the wife of Maury I. Diggs, who also blamed the defendant for her husband's neglect and his associations with other women; the indignation and resentment of his own wife for his neglect of her, she threatening to complain to the juvenile authorities in Sacramento and to have the young women arrested; his own probable arrest by the juvenile authorities for contributing to the delinquency of Lola Norris, a minor, 20 years of age; all these, and other, matters coming fast and thick upon him induced him to leave Sacramento rather than face what he believed to be the imminent and impending danger of exposure, disgrace, scandal, notoriety, bodily harm and probable arrest.

We are, therefore, brought to the threshold of the second proposition advanced in this Opening Brief, and that is *that*, as the facts adduced by the prosecution do not make out a case of commercialized vice, or of “white-slavery”, and there is not the slightest pretense that the defendant, by any act of transportation (assuming that he did anything of that kind, which we deny), profited financially, or expected to profit financially, or share in any profit ensuing, or arising, or expected to arise, from the transportation of Lola Norris, and because of any subsequent immoral act or conduct on her part, *there can be no violation of the “White-slave traffic Act”*. In other words, we contend that the “White-slave traffic Act” was intended by Congress to apply only to cases of commercialized vice—of “white-slavery”—and not to “*des affaires-de-coeur*” or escapades such as the facts disclose in the case at bar.

In support of this contention, which we do not understand to have been directly raised in any previous case either in the Supreme Court or the Circuit Court of Appeals, it will be necessary to examine closely the provisions of the “White-slave traffic Act” and to refer, briefly as possible, to the history of its enactment and other matters with reference thereto.

The defendant respectfully contends that the “White-slave traffic Act,” *as construed by the trial Court*, is unconstitutional; and he further contends

that the *facts disclosed at the trial could not in any event constitute a crime under the said Act.*

In stating these points for argument and elucidation, we are not unmindful of the rulings of the United States Supreme Court in the cases of *Athanasaw v. U. S.*, 227 U. S. 326; *Hoke v. U. S.*, 227 U. S. 308; *Bennett v. U. S.*, 227 U. S. 333; *Harris v. U. S.*, 227 U. S. 340; *U. S. v. Bitty*, 208 U. S. 393, nor the several other federal cases construing the Act and reported in the Federal Reporter.

The indulgence of this appellate tribunal is respectfully solicited, if we revert to elementary rules of construction and interpretation; but the gravity of the case compels us to present the argument in as clear a light as possible that no injustice may be done the accused.

The Courts will take judicial notice that the traffic in girls and women as prostitutes, or to be debauched, or for other immoral practices, for gain, is a species of illicit *commerce*. This *traffic* reached such alarming proportions and became such a menace to society generally that it became necessary for the governments of the world to take formal steps to suppress it. To that end, a conference of nations was called and held in Paris. As a result of that conference the different nations represented, upon July 25, 1902, entered into an "agreement or project of arrangement for the suppression of the white-slave traffic, * * * for submission to their respective governments." This agreement was made

public within the United States, by proclamation of the President, upon June 18th, 1908.

35 U. S. Stat. at Large, pt. 2, pages 1979-1984.

For the purpose of carrying out the terms of that international agreement, the "White-slave *traffic* Act" was passed. It was approved June 25th, 1910.

36 U. S. Stat. at Large, 825.

The Courts will further take judicial notice of the illicit *traffic* as condemned, exposed and generally commented upon in the daily press, magazine articles and books; also as depicted in theatrical plays and moving-picture shows generally immediately preceding and contemporaneous with the passage of the Act.

From these different sources and from general public and private discussions, the terms "*white-slave*", "*white-slaver*", and "*white-slave traffic*" have now each received a definite meaning in the English language, of which, again, the Courts will take judicial notice.

The Funk & Wagnalls New Standard Dictionary of the English language (New York & London, 1913) thus defines "white-slave":

(Title "slave") "a girl *sold into captivity*". "White slavery", under the title "slavery" is thus defined by that condition to which young and innocent girls are debased when *sold into captivity* for immoral purposes.

"Judge Thomas T. C. Crain in General Sessions, New York, May 26, 1910."

Judge Russell, in *U. S. v. Hoke*, 187 Fed. 992, on page 1002, makes use of the term "*white-slaver*" in the following sentence:

"If a state when considering legislation for the suppression of prostitution within its own limits may properly take into view the evils that inhere in that degrading vice, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by allowing the *white slaver* to transport women and girls from one state to another for the purpose of prostitution and debauchery?"

We thus clearly perceive that there was loud and popular call all over the civilized world for legislation to root out the evil. The popular demand resulted in the enactment by Congress of the Act of June 25, 1910, the Act under which the defendant was convicted.

Sedgwick, on Statutory and Constitutional Law, says:

"On the other hand, there is no doubt that very eminent judges have, in the construction of statutes, been wont to permit their minds to be influenced, and in fact to take a sort of judicial cognizance of many intrinsic facts, in regard to which evidence certainly would not have been permitted, and which, indeed, could not perhaps be proved.

The English statute, 26 Geo. 11, c. 23, declared all marriages of children under age void, unless the consent of the parents or guardians was first obtained. The question was brought before the Kings Bench, whether the act was to be interpreted to include illegitimate children; and Lord Mansfield, in holding that it

did so, put his decision on the ground of the mischiefs which the act was intended to obviate; 'this act was passed in order to prevent the illegal practice of clandestine marriages, which were become so very numerous, that places were set apart in the Fleet and other prisons for the purpose of celebrating clandestine marriages. The Court of Chancery, on the ground of its illegality, made it a contempt of the court to marry one of its wards in this manner. They committed the offenders to prison; but that mode of punishment was found ridiculous and ineffectual. Then this act was introduced to remedy the mischief.' "

Sedgwick on Statutory & Constitutional Law,
pages 241-242.

The true purpose and scope of the "White-slave traffic Act" is nowhere better stated than in the report of the Committee on Interstate and Foreign Commerce to Congress in favor of the adoption of the bill then pending, which subsequently became the "White-slave traffic Act". This report was made through Representative Mann, the author of the "White-slave traffic Act". We set out just such portions of that report as are apposite to this particular phase of our argument:

("THE WHITE SLAVE TRADE.")

"A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a *villainous interstate and international traffic in women and girls*. The legislation is not needed or intended as an aid to the states in the exercise of their police powers in the suppression or regulation of immorality in

general. *It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.*

The evil, as a present day existing evil of widespread dimensions which has arisen, has been given careful attention by the representatives of most of the civilized nations of the world, and has been made the subject of an international agreement. Thousands of public-spirited citizens have combined in various national and state organizations for the purpose of lending their aid in its suppression. The *white-slave trade* has been so prevalent that prosecuting officers, both state and federal, even under inadequate and insufficient laws, have been able to secure many notable convictions. It is an *evil* which many state legislatures have attempted to regulate within the past two or three years by means of the enactment of state statutes. Inasmuch, however, as the *traffic* involves mainly the transportation of women and girls from the country districts to the centers of population and their importation from foreign nations, the *evil* is one which cannot be met comprehensively and effectively otherwise than by the enactment of federal laws.

Investigations conducted by government agents disclose the fact that a national and international *traffic exists in the buying, selling, and exploitation of women and young girls for immoral purposes.* This *traffic* has come to be known the world over as '*the white-slave trade*'. It is referred to by the Paris conference as '*the trade in white women*'.

There are few who really understand the true significance of the term '*White-slave trade*'. Most of those who have given only a casual thought to the subject have the im-

pression that women who lead immoral lives in public houses are there voluntarily, either because they are attracted by the excitement of such a life or because they have found it an easy way to earn a living. In many cases such is not the fact. The results of careful investigation into this subject discloses the fact that the inmates of many houses of ill fame are made up largely of women and girls whose original entry into a life of immorality was brought about by men who are in the *business of procuring women for that purpose—men whose sole means of livelihood is the money received from the sale and exploitation of women who, by means of force and restraint, compel their victims to practice prostitution.* These investigations have disclosed the further fact that these women are *practically slaves* in the true sense of the word; that many of them are kept in houses of ill-fame *against their will*; and that *force, if necessary, is used to deprive them of their liberty.*

The characteristic which distinguishes "*the 'white-slave trade'*" from *immorality in general* is that the women who are the *victims* of the *traffic* are *unwillingly forced to practice prostitution.* The term '*white slave*' includes *only* those women and girls who are *literally slaves*—those women who are *owned and held as property and chattels*—whose lives are lives of *involuntary servitude*; those who practice prostitution as a result of the activities of the *procurer*, and who, for a considerable period at least, continue to lead their degraded lives because of the power exercised over them by their *owners.* In short, the *white-slave trade* may be said to be the *business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes.* Its *victims* are those women and girls who, if given a fair chance, would, in all human probability,

have been good wives and mothers and useful citizens.

The preamble of an existing international agreement on this subject states that the several governments, 'being desirous to assure to women who have attained their majority and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the *criminal traffic known under the name of trade in white women* ("traite des blanches"), have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose'. It is the purpose of the proposed laws, in so far as it may be possible for Congress to do so, to protect women and girls against this *criminal traffic* by providing for the punishment of those engaged in that *traffic* and by regulations established by the act.

Extensive investigation by government commissions and prosecuting officers in various parts of the country disclose the fact that in many cases involving women and girls imported into this country, and those transported from one state to another, the *procurers resort to all of the means and devices known to the criminal classes to accomplish their purposes. Liquor, trickery, deceit, fraud, and the use of force are resorted to by the procurer to place the girl under his power.* In some cases those who have been induced to come to the large cities are first introduced to the house of prostitution under the influence of liquor; in others, the *procurer* enters into a pretended marriage with his victim; in many cases involving the importation of women and girls from abroad and their transportation from one state to another the inducement is the promise of legitimate employment with handsome compensation. *Hundreds of men in large cities live from the earnings of the victims of the white-*

slave trade, and in many instances the more extensive of *international procurers live in affluence*. The books kept by a notorious *importer* of French girls, who was arrested in Chicago a few months ago, disclosed his earnings for the year previous to his arrest, largely from his *importation and wholly from his exploitation of girls*, to have been more than \$102,000.

The investigations into this subject conclusively shows the fact that for some time after they are first unwillingly forced to take up a life of prostitution many of the victims would at once abandon it were it possible for them to do so. The facts are that in order to insure her continuance in the degraded life, to which she has been unwillingly forced to submit, the procurer has resort to physical violence and the maintenance of a system of surveillance which makes her, to all intents and purposes, a *prisoner*. Obviously the portions of the act which require the *proprietor of a house of ill-fame* to report to the federal authorities concerning the arrival in the establishment of an alien woman or girl would, at least so far as concerns aliens, make *unlawful detention* practically impossible.

The national and international importance of suppressing this *criminal traffic* is clearly shown by reference to the treaty, the preamble of which is given above, and reports of governmental officers and others on the subject.

The Secretary of Commerce and Labor, in his annual report for 1908, page 18, refers to the matter in the following terms:

‘It is highly necessary that this *diabolical traffic*, which has attained international proportions, should be dealt with in a manner adequate to compass its suppression. No punishment is too severe to inflict upon the *procurers* in this *vile traffic*.’

The act of February 20, 1907 (sec. 29), created an immigration commission, the membership of which was to consist of three Senators, three members of the House of Representatives, and three persons to be appointed by the President of the United States. In a preliminary report submitted February 27, 1909 (Doc. 1489), the commission says:

‘The commission has made an extensive investigation into the question of the importation and harboring of women for immoral purposes. The results show that many women are being regularly imported under conditions which often amount to *absolute slavery*.

* * * * *

‘It is believed that as a result of this investigation the commission will be able to make recommendations which will put a very decided check upon this *horrible traffic*, if, indeed, it will not practically break it up entirely.’

THE TRAFFIC IS SYSTEMATIC AND EXTENSIVE.

Governmental investigations which have been conducted disclose the fact that the importation of women and girls from foreign countries has been systematic and continuous, and has not been limited to isolated and accidental cases. The facts in connection with investigations conducted by the district attorney at Chicago may be taken as typical of the situation in many other cities.

At the time of the arrest of several notorious French importers in Chicago a large amount of correspondence and other documentary evidence fell into the hands of the authorities. This evidence showed beyond a reasonable doubt that there was in existence an *organized system*, or *syndicate*, having for its purpose the importation of women from foreign countries to Chicago, and other cities in the United

States for immoral purposes. This syndicate had headquarters and distributing centers in New York, Chicago, Omaha, Denver, San Francisco, Los Angeles, Seattle and Nome, Alaska.

It is conservatively estimated, from an examination of the data and information at hand, that the *syndicate* has imported annually during the preceding 8 or 10 years on an average of about 2000 women—largely French. It also appears that the *syndicate* regularly sent agents to Europe to *procure girls, at stated prices, to be brought to the United States, where they were placed at the disposal of the keepers of houses of prostitution.* The usual methods employed in evading the immigration officers at the port of entry was to pass the women as the wives or sisters of the procurers with whom they arrived.

One of the chief members of this syndicate was the Frenchman Alphonse Dufaur, who was the defendant in six indictments, in the Chicago District, charging him with harboring alien women in violation of the existing law. Dufaur and his wife subsequently forfeited bonds in the sum of \$25,000 and became fugitives from justice.

Another active importer and procurer was Henry Lair, who operates establishments in Chicago and San Francisco. One of Lair's agents was a man named Louis Paint, who some time ago was convicted of importing in New York and who is now serving a sentence of four years in the penitentiary at Atlanta, Ga., for importing women for Lair. On the recent trial of Lair, in Chicago, Paint testified that he had been given \$800 by Lair and told to go to Paris for the purpose of procuring two girls for Lair's establishment in Chicago. Lair was convicted and sentenced by

Judge Landis to serve two years at hard labor in the penitentiary at Fort Leavenworth and to pay a fine of \$2500.

Various arrests have been made in the Chicago district which disclose the existence of a *traffic in girls* from Hungary, Sweden, Norway, Denmark, Great Britain, and other countries.

In this connection it is of interest to note the *profits realized by those engaged in the importation of alien women for the purpose of prostitution*. For this purpose the information in the possession of the government, as the result of prosecution against the French procurer, Dufaur, which is definite and accurate, may be taken as typical of the *remunerative character of the traffic*. The books of account kept by Dufaur show that *his income*, from his *establishment in Chicago*, realized largely as a result of his success as an *importer*, was, for the 12 months immediately preceding his arrest, upward of \$102,000. These books also show that during the month of May, previous to his arrest, the *earnings of one girl, a recent importation*, were \$723. In almost every instance which has come to the attention of the authorities the girls who were imported from France by the *French syndicate* were compelled to turn over every day to the *proprietor of the establishment in which they were detained all their earnings*. They were usually allowed only enough to purchase the clothing necessary to make them attractive to frequenters of the place.

INTERNATIONAL AGREEMENT FOR THE REPRESSION OF THE TRADE IN WHITE WOMEN.

A project of arrangement for the *suppression of the white-slave traffic* was, on July 25, 1902, adopted for submission to their respec-

tive governments by the delegates of various powers represented at the Paris conference for the repression of the *trade in white women*.

The stipulations of this project of arrangement were confirmed by preliminary agreement signed at Paris, May 18, 1904; by the governments of Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden, Norway, and the Swiss Federal Council.

By its resolution of March 1, 1905, the Senate of the United States advised and consented to the adhesion by the United States to the said project of arrangement, and therefore, on June 6, 1908, the President announced the adherence on the part of this government to the project, and this adherence was on June 15, 1908, covered by the proclamation of the President. This treaty was published in pamphlet form by the State Department as Treaty Series, No. 496, and a complete copy is attached hereto as appendix B. The preamble of this agreement recites that the various governments, being desirous to assure to women who have attained their majority, and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the *criminal traffic known under the name of trade in white women—'traite des blanches'*—have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose." (Italics ours.) (See Congressional Record, Vol. 50, pp. 3368, 3370-3371.)

Where the language of a statute is ambiguous or doubtful, it is well settled that resort may be had to the history of the Act.

"Both the *debates*, however, and the *reports of committees* may be consulted for the pur-

pose of ascertaining the *general object of the legislation proposed* and the *evils* sought to be *remedied.*” (Italics ours.)

36 Cyc., pp. 1138 and 1139, and cases there cited;

Holy Trinity Church v. U. S., 143 U. S. 457, 36 L. Ed. 226.

Even the *title* of the *Act* may be referred to as tending to throw light upon the legislative intent of its *scope or operation*.

Said Mr. Justice Brewer in Holy Trinity Church v. U. S., *supra*:

“We find, therefore, that the *title of the Act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the Committee of each House*, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.” (Italics ours.)

To the same effect, see

Binns v. U. S., 194 U. S. 486; 48 L. Ed. 1087;

Coosaw Mining Co. v. So. Car., 144 U. S. 563; 36 L. Ed. 542.

In ascertaining the intent of a statute, especially the remarks of the member in charge of the bill, are important and of value.

Cyc. Vol. 36, pp. 1138, 1139;

U. S. v. Wilson, 58 Fed. 768;

Ex p. Farley, 40 Fed. 66.

Let us look at the Act.

Section 6 recites the Paris Agreement, the President's proclamation by which it was published to the people of the United States, and the designation of the Commissioner-General as the official in charge of the foreign branch of the traffic, and clearly relates to prostitution or debauchery as a business or commerce, and not to voluntary sexual intercourse free from any feature of profit or remuneration.

Section 8 classifies the whole Act under one subject and entitles it the "*White-slave traffic Act.*"

Sections 2, 3 and 4 define what acts shall be deemed crimes under the Act and provide penalties for their respective violations.

Sections 1 and 7 define words used in the Act; and section 5 prescribes the venue for trials.

The Act was passed by Congress under the grant of power contained in art. 1, sec. 8, subd. 3, of the constitution,—known popularly as the "interstate commerce clause".

From what we have said, it will be apparent, without citation or argument, that the *traffic* in female human beings—the procuring, selling or using for financial profit—comes directly, and not by implication, within the meaning of the word "*commerce*" as used in the constitution.

However, the trial Court, we respectfully submit, conceived a wrong impression of the nature and scope of the Act and erroneously instructed the jury to the injury of the defendant. The only definition of "interstate commerce" given the jury by the Court will be found on pages 427, 428, of the Transcript of Record, where the Court said:

"The term interstate commerce, so far as here involved, means transportation or carrying from one state to another, and such transportation may be by means of a railroad or any other mode of carriage usually employed by common carriers of passengers."

And the Court's whole charge to the jury is based upon that erroneous definition of the term "interstate commerce" as used in the Act.

It is upon this that we predicate an assignment of error among several others on the same general subject.

A perusal of the Act will readily disclose where the Court obtained its erroneous conception.

The title of the Act is misleading. At first reading, one would readily conclude that the subject was "An Act to prohibit the *transportation* for immoral purposes of women and girls". Again, the first section would lead one to the same conclusion, wherein it says:

"That the term 'interstate commerce' *shall include* transportation from any state or territory or the District of Columbia to any other state or territory or the District of Columbia."

The subject of the Act, however, as expressed in the title, is: "An Act to further regulate interstate and foreign *commerce*"; and the first section merely recites that the term "interstate" shall include any state, territory and the District of Columbia. In other words, the Act is for the purpose of further regulating interstate and foreign *commerce*, and *not* an Act to regulate the *transportation* of women and girls for immoral purposes, as erroneously conceived by the trial Court.

Let us now elucidate by applying a few rules of construction and interpretation.

"Laws are expounded and enforced, not made, by the Courts. The makers are entitled to have their real meaning, if it can be ascertained, carried out. Hence the *primary object* of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended. Hence, also if the Courts can ascertain the legislative meaning, their duty is to give it effect, whatever may be the personal opinions of the incumbents of the bench on the policy of the law."

Bishop on Statutory Crimes, 3d Ed. Sec. 70.

"It is indispensable to a correct understanding of a statute to enquire first what is the subject of it. When the subject matter is once clearly ascertained and its general intent, a key is found to all its intricacies; general words may be restrained to it, and those of a narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be

modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention. * * * In the Eureka case, Mr. Justice Field said: 'Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature. The inquiry, where any uncertainty exists, always is as to *what the legislature intended, and when that is ascertained it controls.*' * * *"

Vol. II Lewis' Sutherland Statutory Construction, 2d Ed. Sec. 347.

"In *United States v. Winn*, 3 Sumn. 209, 211, Fed. Case No. 16,740, Mr. Justice Story said that the proper course is 'to search out and follow the true intent of the legislature and to adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.' To the same effect are *United States v. Morris*, 14 Pet. 464, 10 L. Ed. 543; *American Fur. Co. v. United States*, 2 Pet. 358, 367, 7 L. ed. 450, 453; *United States v. Lacher*, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625; *Sedgw. Stat. & Const. Law*, 2d ed. 282; *Maxwell, Interpretation of Statutes*, 2d ed. 318."

U. S. v. Bitty, 208 U. S. 393, 403, 52 L. ed. 543.

Reverting to the case at bar:

What was the *intent* of the legislature in enacting "The White-slave traffic Act"? From what sources do we, or can we ascertain, such intent?

(1) The congressional intent is expressed in the title:

“An Act to further regulate interstate and foreign *commerce* * * *.”

(2) The congressional intent is expressed in section 6 of the Act:

“and in pursuance of and for the purpose of carrying out the terms of the agreement or project of arrangement for the *suppression of the white-slave traffic*, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris Conference and confirmed by a formal agreement signed at Paris on May eighteenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight, as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight, * * *.”

(3) The congressional intent is expressed in section 7 of the Act, wherein it is provided that a corporation, company, society or association may be guilty of a violation of the provisions of the Act, and this rule of construction is prescribed:

“The word ‘person’, as used in this Act, shall be construed to import both the plural and the singular as the case demands, and shall include corporations, companies, societies and associations. When construing and enforcing the provisions of this Act, the act, omission or failure of any officer, agent or other person acting for or employed by any other person or by any corporation, company, society or association, within the scope of his employment

or office, shall in every case be also deemed to be the act, omission or failure of such other person, or of such company, corporation, society or association, as well as that of the person himself."

(4) The congressional intent is expressed in section 8 of the Act, wherein it defines and entitles the Act as the

"White-slave traffic Act."

"White-slave, a girl *sold into captivity for immoral purposes.*"

Standard Dictionary, *supra*;

Holy Trinity Church v. U. S., 143 U. S. 457,
36 L. Ed. 226.

(5) The congressional intent is expressed in the caption of the President's Proclamation, referred to in section 6 of the Act (35 Stat. at Large, pt. 2, p. 1979):

"Agreement between the United States and other Powers for the *repression of the trade in white women*. Signed at Paris, May 18, 1904; ratification advised by Senate, March 1, 1905; adhered to by the President, June 6, 1908; proclaimed June 15, 1908."

(6) Also in the first paragraph of the Proclamation:

"Whereas a project of arrangement for the *suppression of the white-slave traffic* was, on July 25, 1902, adopted for submission to their respective governments by the delegates of various Powers represented at the Paris Conference for the *repression of the trade in white women.*"

(7) Also in the preamble of the International Agreement, referred to and made a part of the President's Proclamation (35 St. at Lg. pt. 2, pp. 1980-1984):

"His Majesty the German Emperor, * * *, being desirous to assure to women who have attained their majority and are subjected to deception or constraint, as well as to minor women and girls, an efficacious protection against the *criminal traffic* known under the name of *trade in white women* ('*traite des blanches*') have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose * * *."

(8) Also in article 6 of the Agreement which recites:

"The contracting governments agree, within the limits of the laws, to exercise, as far as possible, a supervision over the bureaux or agencies which occupy themselves with finding places for women or girls in foreign countries."

(9) Further, in the action of the Senate upon the Agreement (Vol. 39 Cong. Rec., pt. 4, p. 3770):

"Repression of the *trade in white women*."

"The injunction of secrecy was removed March 1, 1905, from projects of a convention and an additional arrangement adopted on July 25, 1902, by the delegates of the various Powers represented at the Paris conference for the repression of the *trade in white women* ('*traite des blanches*')."

In these several documents it will be seen that the terms "*trade in white women*" and "*white-slave traffic*" are used interchangeably, and the words "*trade*" and "*traffic*" as being synonymous.

A few definitions may aid in bearing out our contention. They are quoted from *The Century Dictionary* (N. Y. 1913):

“Slave”—“A person who is the chattel or property of another and is wholly subject to his will; a bond-servant; a serf.”

“Slave-trade”—“The trade or business of procuring human beings by capture or purchase, transporting them to some distant country, and selling them as slaves; traffic in slaves.”

“Trade”—“8. The exchange of commodities for other commodities or for money; the business of buying or selling; dealing by way of sale or exchange; commerce; traffic.”

“Traffic”—“1. An interchange of goods, merchandise, or other property of any kind between countries, communities or individuals; trade; commerce.”

(10) The congressional intent is disclosed by the history of the Act, the debates in Congress and the reports of committees.

Holy Trinity Church v. U. S., 143 U. S. 457;
36 L. Ed. 226.

(11) The congressional intent is shown by the contemporaneous construction given the Act by the executive departments of the Government.

U. S. v. Ala. R. R. Co., 142 U. S. 621; 35
L. Ed. 1135;

U. S. v. Finnell. 185 U. S. 236, 244; 46 L.
Ed. 890;

New York v. New York City R. R. Co., 193
N. W. 543, 86 N. E. 565.

It is hardly necessary, however, to go outside the Act to ascertain the intention of Congress to suppress the white-slave traffic,—the abominable practice of enticing, coercing, buying and otherwise procuring girls to be enslaved in prostitution, debauchery and other immoral practices for the profit and gain of their masters—white-slavers. It is not necessary to refer to the newspaper, magazine or platform demand for legislative action prior to and contemporaneous with the passage of the Act.

Could any other intent be deduced? If there can, let counsel for the United States point it out.

Having thus ascertained the

“true intent of the legislature”, to use Mr. Justice Story’s language, *supra*, “we must adopt that sense of the words which harmonize best with the context and promotes in the fullest manner the apparent policy and objects of the legislature.”

Applying this rule to sections 2, 3 and 4 of the Act, it will be seen, at a glance, that they *solely* refer to any “*person*”. But, by section 7 of the Act, the word “*person*” is made to include a “corporation, company, society, or association”, engaged in the interstate traffic in *white-slaves* or women to be used for immoral practices. It will not be seriously claimed that a “corporation, company, society, or association” is capable of sexual intercourse. Yet the use of the words “corporation, company, society, or association”, shows that Congress had in

mind the fact that a "corporation, company, society, or association" might engage, equally with a person, in the illicit *trade, traffic or commerce* of bartering in girls and women for immoral purposes for profit or gain.

We deem this conclusive.

A more appropriate title for the Act would, perhaps, have been, "An Act to further regulate interstate and foreign commerce by prohibiting therein the trade or traffic in white women to be used as slaves in commercialized vice."

None of the evidence or testimony in the case at bar attempts to prove the defendant a "white-slaver". There is not a scintilla of evidence of any, the slightest, commercialism in the case at bar. The whole theory of the prosecution, from its inception, was based upon the erroneous conception that the Act covered all cases of immoral interstate conduct. The prosecuting attorneys, as well as the Court, labored under this grossly erroneous interpretation of the Act. The erroneous conception, as we have before stated, consisted of the idea that it was an Act to regulate *transportation*—that the jurisdiction of the Court rested upon the right to regulate interstate *transportation*, instead of the right to regulate interstate *commerce*.

This leads us to the construction to be placed upon the word "commerce" as used in the federal constitution.

We respectfully contend that the word “commerce”, as employed by the framers of the constitution, implies a means to a financial, pecuniary or other like remunerative end,—traffic or trade for emolument or compensation. That this meaning is basic or fundamental. That we unconsciously imply such meaning whenever we employ the word.

Bearing this fundamental definition in mind, let us apply some elementary rules of construction and examine some of the leading cases which have construed this word in the constitution.

“48. It is a cardinal rule in the interpretation of constitutions that the instrument must be so construed *as to give effect to the intention of the people who adopted it.*

Where the meaning shown on the face of the words is definite and intelligible, the Courts are not at liberty to look for another meaning, even though it would seem more probable or natural, but they must assume that the constitution means just what it says.

3. A constitution should be construed with reference to, but not overruled by, the doctrines of the common law and the legislation previously existing in the state.”

Black’s Constitutional Law, 2d Ed., Secs. 48-49.

“The Court should put itself in the position of the legislature,—stand, in contemplating the statute, where the maker of it stood—the better to discern the reason and scope of the provision. They who voted for the measure must have had in mind a meaning for the enacted words; and the meaning, thus perceived, must be given

them by the Court. Thus, 'Time,—if the statute is old, or if it is modern, the Court should transport itself back to the time when it was framed, consider the condition of things then existing, and give it the meanings which the language as then used, and the other considerations, require.'

Bishop on Stat. Crimes, 3d Ed., Sec. 75.

"In a book not strictly of the legal class we read: 'No sentence or form of words can have more than one "true sense", and this only one we have to enquire for. This is the very basis of all interpretation. * * * Every man or body of persons, making use of words, does so in order to convey a certain meaning; and to find this precise meaning is the object of all interpretation. To have two meanings in view is equivalent to having no meaning, and amounts to absurdity.' "

Same, Sec. 94.

"Adopted from other state or country. * * * In the adjudications on this question, no nice distinctions have been drawn; but, in a general way, it is held that a word, phrase or statutory provision, adopted from the laws of another state, or from England, * * * will ordinarily receive the construction it had in the law whence it was taken.

Constitution.—In pursuance of the presumed intent of the makers, a constitutional provision, adopted from another state after it had been judicially interpreted, will, in the absence of any contrary indication, retain the meaning thus previously ascertained."

Same, Sec. 97.

"Looking to the subject for the meaning, if a statute employs a word which, though not

legal is technical to its subject, we give it the technical sense,—not the general sense, not one technical to another subject—unless something appears indicating a different intent of the legislature. Thus,—

An Act relating to commerce is interpreted by the vocabulary of merchants, not of mechanics.”

Same, Sec. 99.

“Ordinarily the language is to be understood in its common signification, as for instance, general terms are to receive their general, not restricted sense.”

Same, Sec. 102.

“Our constitutions, being, like statutes, written instruments and laws, are, in the main, similarly interpreted.”

Same, Sec. 92.

“Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power,—some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influence that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it, and inconveniences can be borne long enough to await that process. But if the legislature or the Courts undertake to cure defects

by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

Oakley v. Aspinwall (N. Y.), 3 Coms., 547, 568.

Having these fundamental principles in mind, we will proceed to apply them to the word "commerce" as used in the constitution.

Our first step will be to place ourselves in the constitutional convention—revert to Philadelphia, Pennsylvania, as of September 17th, 1787,—the date of the adoption.

The next step will be to ascertain what that convention understood by the word "commerce" when the delegates caused it to be inserted into subdivision 3, section 8, of article 1 of our federal constitution.

As we have seen, resort may be had to prior laws—to the English common law—the law adopted by this country and so adopted at about that time. Therefore, the highest authority we could find to enlighten us upon the subject would be the definition given it by Blackstone himself. Sir William Blackstone completed his Commentaries in 1765, just twenty-two years prior to the drafting of our

constitution. No one will argue that any different meaning crept into the law during this interim. Blackstone's definition of both foreign and domestic commerce will be found on pages (original paging) 273 to 278, subdivision V. In part, it is as follows:

“V. Another light in which the laws of England consider the King with regard to domestic concerns, is as the arbiter of commerce. By commerce, I at present mean domestic commerce only. It would lead me into too large a foreign trade, its privileges, regulations, and restrictions, and would be also quite beside the purpose of these commentaries, which are confined to the laws of England; whereas, no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of *traffic* and merchandise; neither can they have a proper authority for this purpose. For, as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called *the law merchant* or *lex mercatoria*, which all nations agree in, and take notice of. And in particular it is held to be part of the law of England, which decides *the causes of merchants* by the general rules which obtain in all commercial countries; and that often, even in matters relating to *domestic trade*, as for instance, with regard to the drawing, the acceptance, and the transfer of inland bills of exchange.

With us in England, the king's prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:

First, the establishment of *public marts*, or places of *buying and selling*, such as *markets*

and fairs, with the tolls thereunto belonging. These can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which presupposes such a grant. The limitation of these *public resorts* to such time and such place as may be most convenient for the neighborhood, forms a *part of economics*, or domestic polity, which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases.

Secondly, the regulation of weights and measures. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent *value*. * * *"

Thirdly, as money is the *medium of commerce*, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority to make it current. Money is an universal medium, or common standard, by comparison with which the *value of all merchandise* may be ascertained; or it is a sign which represents the respective values of all commodities."

Chancellor Kent's Commentaries (N. Y., Nov. 23d, 1826) on the subject of commerce is also instructive.

Commentaries on American Law, Vol. 1, pp. 32-34; 431-439.

Not only in these works, but in all definitions of the word found in the text books and reported cases, the fundamental conception of the word "commerce" will be found to include a transaction for a monetary or pecuniary gain. Of course, the word is broad and includes within its meaning any an-

cillary subject, such, for instance, as the federal government jurisdiction over navigable waters wholly within a state. (Act of Sept. 19th, 1890.)

In other words, as we gather from Mr. Blackstone's definition, the first principle of the word in its, perhaps we might say, barbaric sense, is trade or barter. To this, the English law had included the subject of weights and measures and the coinage of money. Still other auxiliary subjects have also been construed as being included within the meaning of the word, but a close study of them all will disclose that the earliest conception of the word is still retained,—commercial intercourse for gain.

Judge Russell, in *U. S. v. Hoke*, 187 Fed. 992, has cited a number of cases which construe this section of the constitution.

The first subject commented upon is that the power to regulate commerce includes the power to regulate the transportation of passengers. The jurisdiction of Congress to exercise this power in interstate travel, we do not question. We have no desire to quarrel with the United States Supreme Court regarding any of its decisions on this subject. We agree implicitly with that Court upon this subject. The common carrier of passengers is undeniably engaged in a commercial pursuit, the traffic for gain. The contract for carrying—evidenced by a ticket—is a commercial transaction and should be regulated by the state. The common car-

rier is engaged in a purely commercial enterprise and his business should be regulated. The passenger, as long as his contract of carriage is executory, is, to a more or less extent, subject to observe certain rules, regulations and laws which Congress directly, or through its agents, may impose. To this extent, therefore, Congress, under this constitutional power, regulates the passenger as well as the carrier. But this regulation of the passenger has its beginning and its end in the contract of carriage—the contract for gain—entered into by the common carrier engaged in a commercial enterprise. For instance: Should Congress pass a law, in furtherance of the public safety, forbidding passengers to stand upon the platform of a car while the train was in motion and prescribing a penalty to be imposed upon the passenger for its violation, it would be a constitutional law in interstate travel. Likewise, a federal interstate law forbidding expectorating on the floor or platform of an interstate train would be another instance.

But, outside the scope of the contract of carriage, the jurisdiction does not exist. For instance: Congress could not enact a law making it a federal offense for a person to purchase a ticket in one state, and, riding on a common carrier into another state, with malice aforethought for the express purpose of committing the crime of murder in such other state. In such case, the regulation would be the regulation of a criminal, not the regulation of a

passenger. The subject of the law would be the prevention of and punishment for a criminal offense. The fact that the defendant was an interstate passenger would be a mere incident. The intent of Congress, as expressed in such an Act, would be to prevent and punish for crime. In no sense, could it be construed as an Act to regulate interstate commerce. It would be an attempt to usurp a purely police power, which, under our laws, is vested exclusively in the several states. The same rule would apply were the wrong merely one of immorality. Suppose the Act one where Congress attempted to make it a federal offense for a man to travel from one state into another to have sexual intercourse with a prostitute or to debauch a woman, or attend an extremely immoral exhibition. What would be the subject of such an Act? What would be the "legislative intent" as expressed in the Act? Purely an attempt on the part of Congress to suppress or regulate immoral acts and the contract of passage on the common carrier merely an incident in no manner connected with the wrong sought to be prohibited. No barter, trade or traffic for gain would be involved in the commission of the offense itself—no act of a commercial nature would enter into the wrong doing. Congress would, in such a case, be attempting to regulate morals—not interstate travel. Again, would it make it any more of a commercial transaction should the woman to be debauched go in company with the accused? The

offense would be the same and the subject of the Act identical. As said by Mr. Justice Brewer in *Keller v. U. S.*, 213 U. S. 138; 53 L. Ed. 737; 29 Sup. Ct. Rep. 470; 16 A. & E. Ann. Case 1066, at page 149, a case decidedly in point here:

“While the Acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced.”

That Congress has police power is not to be denied; but, as Mr. Black says:

“It is true that Congress has no general power to make police regulations for the people of the United States, nor has it authority to interfere, in matters not committed to its exclusive jurisdiction, with the internal affairs of the states, under the pretense of police regulations.”

Black’s Cons. Law, 3d Ed. 391-2.

The same author further says (p. 435):

“Yet a state has the same unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the federal constitution, and ‘all those powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrounded or restrained and consequently in relation to these, the authority of a state is complete, unqualified and exclusive.’ ”

“A deliberate purpose to place the state police power under federal control can hardly be attributed to the framers of the constitution.”

Freund Police Power, Sec. 65.

See also:

Bishop on Stat. Crimes, 3d Ed. Sec. 990;
Tiedeman's Lim. of Police Power, Sec. 201.

The subject of the Act construed in the Rahrer case was intoxicating liquors—a commercial subject (140 U. S. 545, 35 L. Ed. 572).

The subject of the Addyston Pipe case was iron pipe—another commercial subject (175 U. S. 211, 44 L. Ed. 136).

The subject of the Popper case was the traffic in instruments intended to prevent conception—the selling of a commercial article in interstate trade (179 U. S. 305, 45 L. Ed. 203).

The subject of the Act construed in the lottery cases is expressed in its title: “An Act for the suppression of lottery traffic * * *” A trading in lottery tickets for gain—a pernicious commercial transaction (188 U. S. 321, 47 L. Ed. 492).

And so on with the others mentioned. The anti-trust Act; the Act prohibiting the interstate trading in misbranded or mislabeled dairy products; the pure food law; the Act prohibiting interstate traffic in gold and silver branded “United States Assay”. These are all laws regulating commercial

transactions—traffic or trade for gain—or articles of commerce—merchandise.

And so do we agree with Judge Russell, where he says, on page 1004 of the Hoke case:

“I might go ahead and mention numbers of instances where the regulatory power of Congress as contained in the constitution has been invoked for prohibiting the transportation from place to place of certain articles, and the Courts have well settled the proposition that the power of Congress to regulate the transportation of persons differs in no particular or degree from its power to regulate the transportation of property and things.”

Provided, that such persons are transported in the sense of articles of commerce—subjects of remuneration to those dealing or trading in or with them—as the objects of financial or pecuniary profit to the one transporting them. In this connection we do not mean the *common carrier*, but the *white-slaver*.

Otherwise, were the Act intended to “regulate the transportation of persons”, then the common carrier corporation, through its agents, would be guilty of a violation of the Act should any such agent sell an interstate ticket to a woman whom such agent knew intended to engage in prostitution, debauchery or other immoral practice—which construction would be absurd.

This latter would be the *regulation of the passenger traffic*; while the former would be the *regulation of the white-slave traffic*.

It may be contended that as one meaning of the word "commerce" is "sexual intercourse", that is sufficient to confer upon Congress jurisdiction to regulate such intercourse among the citizens of different states.

As we have seen, a word can have but one "true meaning"—and that controls.

The word "commerce" also means "a game of cards, played in various ways". But we do not expect counsel to insist that this would confer jurisdiction on Congress to regulate interstate poker, whist or five-hundred.

We do not think it necessary to argue that neither of these meanings, nor any other meaning than the one we have given, was intended by the framers of our constitution.

Taking all the testimony and evidence submitted in the case at bar to the jury as true, all the acts, commissions and omissions of the defendant combined would merely show an act of immorality, in so far as the United States is concerned.

That the white-slave traffic is pernicious and should be stamped out, we thoroughly agree. But that the Act covers mere interstate sexual intercourse immorality, we most emphatically deny. In this connection, we believe that we have conclusively shown that the view taken by the trial Court, of the object and scope of the Act, is unconstitutional. That the Act covers the subject *only* which it itself

expressly says it covers—the TRAFFIC *or* COMMERCIAL DEALING *in women and girls as prostitutes or for debauchery, or any other immoral “practices”*. That, had Congress intended that the Act should cover all interstate immoral acts, as the trial Court ruled throughout the trial and instructed the jury it did, in such a case the Act would be unconstitutional, such immoral conduct not amounting to an act of *commerce* within the meaning of the constitution. The object of Congress was to regulate interstate *commerce* in the traffic in girls and women, not to regulate mere interstate *immorality*.

Keller v. U. S., *supra*;

Ex parte Gouyet, 175 Fed. 230.

All the cases, in which the Act has been construed, have been cases within the object and scope of the statute, as we have construed it. That being so, none of them is in point here. As we have before said, we have no quarrel with any of the Courts which have heretofore held this law constitutional as applied to the facts disclosed in the reported cases.

Take, for example the case of Hoke et al. v. United States, 227 U. S. 308, 57 L. Ed. 523. It clearly appears in that case, that Effie Hoke kept a house of prostitution and that the trial Court “permitted the women to testify as to the acts of Effie Hoke at her house at Beaumont, restraining the liberty of the women in coercing their stay with her”. It also appeared that the women trans-

ported were prostitutes. As stated by the Supreme Court:

“There was sufficient evidence, as the trial Court said, of the fact of the immorality of their lives, and explicitly ruled that they could be shown to be public prostitutes.”

Furthermore, the indictment in the Hoke case charged that the transportation was “for the purpose of prostitution”, whereas, in the case at bar, there is no such allegation or pretense. It is simply charged that Lola Norris was transported for an immoral purpose, to wit, “that the aforesaid Lola Norris should be and become the *concubine* and the *mistress* of the said defendant”.

Next, take the case of *Bennett v. United States*, 227 U. S. p. 333, 57 L. Ed. 531. It appears that that also, was a case involving the transportation of women for a commercial and immoral purpose, to wit, prostitution.

The same is true of the case of *Harris v. United States*, 227 U. S. p. 340; 57 L. Ed. 534. That, also, was a case of commercialized vice.

Next, considering the case of *Athanasaw et al. v. United States*, 227 U. S. p. 326; 57 L. Ed. 528, it also affirmatively appears that that was a case of commercialized vice. The facts, as stated by the Supreme Court of the United States, show that the girl, in that case, was 17 years old and was transported ostensibly to become a chorus girl at the Imperial Theatre, Tampa, Florida. The theatre was

operated by the defendants, and their agent or booking representative at Atlanta had engaged her and furnished her transportation. She arrived at Tampa and met the defendant Athanasaw.

“As to what then took place, the girl testified as follows:

‘He showed me to my room and took the check to get my trunk. I went to sleep and slept until 2 o’clock in the afternoon. At that hour one of the girls woke me up to rehearse. I went down in the theatre, and stayed there about an hour, rehearsing, singing, and then went to lunch in the dining room. All of the girls were there and several boys. I had never had any stage experience. At lunch they were all smoking, cursing, and using such language I couldn’t eat. After lunch I went to my room, and about 6 o’clock Louis Athanasaw, one of the defendants, came and said to me I would like it alright; that I was good looking and would make a hit, and not to let any of the boys fool me, and not to be any of the boys’ girl; to be his. *He wanted me to be his girl; to talk to the boys and make a hit, and get all of the money I could out of them.* His room was next to mine, and he told me he was coming in my room that night and sleep with me; and he kissed and caressed me. He told me to dress for the show that night and come down to the boxes. I went into the box about 9 o’clock. About that time Louis Athanasaw’s son knocked on my door and told me to come to the boxes. In the box where I went there were four boys; they were smoking, cursing and drinking. I sat down and the boys asked me what was the matter; I looked scared. I told them I was ashamed of being in a place like that: and Arthur Schlemann, one of the boys, said he would take me out. The others insisted on my

staying, and *said I would like it when I got broke in*. I tried to go out with Schlemann, but a boy named Gilbert pulled me back, saying, 'Let that cheap guy alone.' Schlemann said he would send a policeman, and in about fifteen minutes Mr. Thompson and Mr. Evans came in for me.' "

That, undoubtedly, was a case of commercialized vice or a "white-slave case", within the letter and spirit of the "White-slave traffic Act". The girl in that case was transported for "the purpose of debauchery", as the indictment there alleged. There was present the element of commercialism. She was to "*get all of the money I (she) could get out of them*", a clear case of commercialized vice. The prosecuting witness further stated that she was told that she "*would like it when she got broke in*", clearly showing that it was intended that she should become a prostitute.

How different are the facts in the case at bar. We have but to quote from the testimony of Lola Norris, the prosecuting witness, on her cross-examination, to appreciate this radical difference. Miss Norris testified as follows:

"Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse

with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody." (Transcript of Record, pp. 309, 310.)

Next, take the case of *U. S. v. Bitty*, 208 U. S. 393; 52 L. Ed. 543, and it will be found to be clearly distinguishable from the case at bar. The defendant, in that case, was convicted under an Act of Congress passed in the exercise of its jurisdiction with reference to *foreign immigration*. That jurisdiction is not founded upon the *commerce* clause of the constitution, but "upon the inherent and inalienable right of every sovereign and independent nation to regulate immigration in furtherance of its safety, independence and welfare."

Cons. Art. 1, Sec. 9.

See note to

Keller v. U. S., 16 A. & E. Ann. Cas. 1069.

Even Mr. Mann, the author of the "White-slave traffic Act", differentiates the case of *U. S. v. Bitty* and concedes that the facts disclosed in that case do not come within the purview of the "White-slave traffic Act". The Report of the Committee on Interstate and Foreign Commerce, submitted by Mr. Mann, sets out:

"SUPREME COURT DECISION CONSTRUING SECTION 3 OF THE ACT OF FEBRUARY 20, 1907.

Section 3 of the Act of February 20, 1907, has received the consideration of the Supreme Court in two cases.

In the first case, that of the United States v. John Bitty (208 U. S. 393), the Supreme Court held that a foreign woman being brought to the United States as the personal, private mistress of a man living here was being imported 'for other immoral purposes', and that, therefore, the importer was subject to the penalty of the statute and the woman to deportation.

This decision is not pertinent to the phase of the subject under discussion, and is mentioned only in passing." (Congressional Record, Vol. 50, p. 3369.)

Furthermore, the congressional history of the Act, as disclosed by the report of the House Committee on Interstate and Foreign Commerce, through Mr. Mann, the author of the "White-slave traffic Act", clearly discloses that the purpose and scope of the "White-slave traffic Act" was to affect cases of *commercialized vice only* and not mere voluntary sexual intercourse unaccompanied with any mercenary object or gain. The report declares, among other things:

"POLICE POWERS OF THE STATES NOT
INTERFERED WITH.

It is not the purpose of the bill to interfere with or usurp in any way the police powers of the states. The bill reported does not endeavor to regulate, prohibit or punish prostitution or the keeping of cases where prostitution is indulged in. The prohibition of prostitution and other immoral practices, and the punishment of the practice of prostitution or the keeping of

houses of ill fame, or other immoral places, in the several states, are matters wholly within the powers of the states and the federal government has no jurisdiction over those subjects. On the other hand it has been shown in the investigation relating to the 'White-slave traffic' that persons engaged in that business in some of the large cities felt quite free to engage in the traffic as between the states, when they hesitated about engaging in the traffic wholly confined to one state.

PROVISIONS OF THE BILL.

Most of the provisions of the bill are based upon the power of Congress over interstate and foreign *commerce.*"

* * * *

"The sections above proposed have been so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitution. The use of interstate commerce in sending prostitutes from one state to another in connection with this traffic in women would seem to be as directly connected with interstate commerce as the sending of tickets from one state to another in furtherance of the operation of a lottery. It is true the act of prostitution is not committed in connection with the interstate transportation nor was the drawing in connection with the lottery a part of interstate commerce."

* * * *

"THE WHITE-SLAVE TRADE.

A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not

needed or intended as an aid to the states in the exercise of their police powers in the suppression or regulation of immorality in general. *It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.*" (Congressional Record, Vol. 50, pp. 3368, 3370.) (Italics ours).

In addition to all of the reasons advanced by us, in support of the contention we make that the "White-slave traffic Act" was intended by Congress to apply only to cases of commercialized vice, we insert an official expression of the views of the Department of Justice of the United States, which has been called to our attention, as follows:

"DEPARTMENT OF JUSTICE

Office of United States Attorney
District of Minnesota.

St. Paul, July 17, 1912.

The Attorney General,
Washington, D. C.

Sir: I have the honor to submit for your direction and advice the facts in a case which is claimed to come within the purview of the Act of June 25, 1910, called the 'White Slave Traffic Act'.

One Ada Cox, twenty-four years of age, residing at Chicago, Ill., came to St. Paul in October, 1910, at the solicitation and expense of one Rufus Edwards. On her arrival here, Edwards met her at the station. They passed the day riding, lunching and drinking, and the night followed at a house of assignation in the

city of Minneapolis. She remained there three days with Edwards and then returned to Chicago. In June, 1911, she repeated this visit under like circumstances.

June 12, 1912, Miss Cox applied to me for a warrant of arrest of Edwards under the above named Act. At that time she made a statement of her connection with Edwards which was taken in shorthand by Mr. J. M. Dickey, Assistant United States Attorney, in this office, and by him written out.

A copy of this statement is enclosed.

Careful consideration of the facts and circumstances as related by Miss Cox fail to convince me that her case came within the spirit and intent of the Mann Act. *The element of traffic is entirely absent from this transaction.* It is not a case of prostitution or debauchery and the general words 'or other immoral practice', should be qualified by the particular preceding words and be read in the light of the rule of ejusdem generis. *This view of the statute is the more reasonable when considered in connection with Section 8 where Congress employs the terms 'slave' and 'traffic' as indicative of its purpose to suppress certain forms of abominable practice connected with the degradation of women for gain.*

Since I have hesitated about having a warrant issued for the arrest of Edwards, Miss Cox has enlisted certain club women in her behalf who are insisting on the arrest being made.

As this case is typical of many others that are liable to be brought to this office I deemed it proper to submit the facts to ascertain if my interpretation of the statute is in harmony with the departmental construction.

Very respectfully yours,
 (Signed) Chas. C. Houpt,
 United States Attorney."

“DEPARTMENT OF JUSTICE.

Washington, D. C.

July 23, 1912.

United States Attorney,
St. Paul, Minn.

I have received your letter of the 17th instant concerning a statement of the facts with reference to the complaint of one Ada Cox, against one Rufus Edwards of an alleged violation of the White Slave Traffic Act.

I agree with your conclusion that the facts and circumstances set forth in your letter and its enclosure do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the federal courts unless other and different facts are presented to you.

Respectfully,

(Signed) GEO. W. WICKERSHAM,
Attorney General.”

In addition to this expression of opinion, we respectfully refer to similar views in other instances expressed by the Hon. Attorney General and to be found in Congressional Record, Vol. 50, pp. 3354 et seq., especially page 3366.

It is a settled rule of statutory construction that where the language of a statute is ambiguous or otherwise doubtful, or, being plain, a literal construction would lead to such absurdity, hardship or injustice, as to render it irrational to impute to the lawmaking power a purpose to produce or permit such result, the contemporaneous construction given by an executive department of the government is of value in endeavoring to ascertain the legislative intent.

Said the Supreme Court of the United States, in the case of U. S. v. Ala. R. R. Co., 142 U. S. 615, 616, 621; 35 L. Ed. 1134 and 1136;

“We think the contemporaneous construction thus given by the executive department of the Government * * * a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case,—should be considered as decisive in this suit.”

Said the Supreme Court of the United States in the case of U. S. v. Finnell, 185 U. S. 236, 244; 46 L. Ed. 890, 893:

“Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. * * * But if there simply be doubt as to the soundness of that construction * * * the action during many years of the Department charged with the execution of the statute should be respected, and not overruled except for cogent reasons.”

In the case of New York v. New York City R. Co., 193 N. Y. 543; 86 N. E. 565, it was held that when the meaning is doubtful a practical construction by those for whom the law was enacted, or *by public officers whose duty it was to enforce it*, is entitled to *great influence*, but the ambiguity must not be captious, but should be so serious as to raise a reasonable doubt in a fair mind, reflecting honestly upon the subject.

See also, statement of the rule and cases collated in Vol. 36 Cyc., pp. 1139-1142.

Another error committed by the trial Court in interpreting the "White-slave traffic Act", was in giving to the words, "debauchery, or for any other immoral *purpose*", a much broader meaning that was the intent of Congress in enacting that law. The trial Judge construed these words as comprehending *any* act of sexual intercourse, even though it was voluntary and absolutely free from any element of commercialism or mercenary gain or profit.

We admit that whatever of doubt or ambiguity there is in the "White-slave traffic Act" arises from the words "debauchery *or for any other immoral purpose*". If given the broad and comprehensive meaning accorded to them by the trial Judge in the case at bar, we respectfully contend that they subvert the intent and purpose of the "White-slave traffic Act" and give the Act a much broader scope and operation than was intended by Congress. If given the less broad interpretation, for which we contend, these words are then given their proper meaning, one which accords with the intent and purpose of Congress in passing the law.

We have seen, from other rules or canons of construction and interpretation, that it was, clearly, the intent of Congress that the highly penal provisions of the "White-slave traffic Act" should apply *only* to cases of *commercialized vice*. This view is further confirmed by taking into consideration the use of the words, "debauchery, or for any other *immoral purpose*". We submit that the trial

Judge was not justified in treating those words as applicable to *any* act of voluntary sexual intercourse absolutely free from any element of commercialism or mercenary gain or profit, such as is disclosed by the facts in the case at bar. The "White-slave traffic Act" makes use of the words, "prostitution or debauchery, or for any other immoral *purpose*", and again in the same section, "to become a prostitute or to give herself up to debauchery, or to engage in any other immoral *practice*". It will be observed that the words "purpose" and "practice" are used interchangeably in the several sections, evidently having in mind various other and baser forms of immorality practiced for commercial gain by women and girls. A perusal of the "White-slave traffic Act" discloses that, in section 2, the words "purpose" and "practice" are used alternately and twice in that section. In section 3, they are used once alternately. In section 4, the word "practice" seems to be substituted for the word "purpose" in the expression "any other immoral purpose". In section 6, neither of the expressions "any other immoral purpose" or "any other immoral practice" seem to be used in the first paragraph of this section. A reference is simply made to "the transportation in foreign commerce of alien women and girls for purposes of *prostitution* and *debauchery*". In the second paragraph of section 6, however, will be found the expression, twice repeated, "any other immoral purpose".

Obviously, the word "practice", used generally throughout the Act interchangeably with the word "purpose", imports something more than a single act of sexual intercourse without a commercial design or purpose. "Practice", as defined by the lexicographers, signifies, *inter alia*, some act or function that we exercise or pursue as an occupation; as, to practice law. (Cent. Dic., Vol. 6, p. 4665.) The word should, therefore, be given this expressive meaning in order to correspond with the evils sought to be eliminated by the passing of the law, and, thus construed, *the vindicatory* part of the law has application only to those who attempt to exercise or follow acts of immorality as a vocation.

"Prostitution", of course, refers to commercialized vice. The words following it, "debauchery, or for any other immoral *practice (purpose)*", under the rule of construction known as "*ejusdem generis*", where general words follow the enumeration of particular classes of persons or things, will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

Cyc., Vol. 36, pp. 1119, 1122, and case there collated.

This rule is especially applicable to statutes defining crimes and regulating their punishment.

State v. Erwin, 91 N. C. 545;

Lane v. State, 39 Ohio St. 312;

Ex p. Muckenfuss, 52 Tex. Cr. 467; 107 S. W. 1131;

State v. Goodrich, 84 Wis. 359; 54 N. W. 577;

Reg. v. Reid, 30 Ont. 732.

Under this rule of construction, the words “or debauchery, or for any other immoral *purpose*”, and again the words “or to give herself up to debauchery, or to engage in any other immoral *practice*”, undoubtedly should be construed as applicable only to “prostitution”, or, in other words, as applicable *only* to *commercialized vice*. The obtaining, furnishing, or bartering in young girls for the purposes of “*debauchery*”, by which we understand that expression to mean the pollution or ruining of young girls, is a species of traffic in young girls and women just as much as the obtaining, furnishing or bartering of more seasoned girls and women for the purposes of prostitution. The further expressions “other immoral *purpose*” and “other immoral *practices*”, are undoubtedly used in the same connection and refer to immoral practices too revolting to discuss, to which young girls and women may be subjected or which they may “practice” for profit or gain.

Likewise, “in accordance with the maxim ‘*nocitur a sociis*’, the meaning of a word used in a statute must be construed in connection with the words with which it is associated. Where several words are connected by a copulative conjunction, they are presumed to be of the same class, unless a contrary intention appears”.

See statement of this rule of construction in Vol. 36 of Cyc., pp. 1118, 1119, and cases there collated.

It is a well known fact that there is a radical difference of opinion between federal Judges, ex-

pressed in the trial of cases brought under the "White-slave traffic Act" as to the proper scope and operation of that Act. Some federal Judges, as did the trial Judge in the case at bar, have held that any act of sexual immorality, even though free from any element of commercialism or profit or gain to the person furnishing the transportation, is within the intent and purpose of the Act; while others have held, in accord with the construction we maintain, that the scope and operation of the Act is limited to cases of commercialized vice only. Among the latter Judges, we beg to refer to District Judge Pollock, of Kansas, whose charge to the jury in a case brought under the "White-slave traffic Act" we incorporate in this Opening Brief, as a part of our argument. This charge is as follows:*

*"In the
District Court of The
United States
for the
District of Kansas
Second Division*

CHARGE TO JURY BY HON. JOHN C. POLLOCK IN
UNITED STATES VS. LEE BAKER
SEPTEMBER 23, 1913

Gentlemen of the jury, you have now listened with care to the trial of this case up to this point when it becomes my duty under the law to charge you as to the law which shall govern you in your deliberations on a verdict in this case. You understand, gentlemen of the jury, in courts of justice where cases are tried before

* Note: This charge was reported by S. A. Buckland, an attorney at law at Wichita, Kansas, and was printed in pamphlet form by that gentleman after its revision by Judge Pollock, and we have inserted the entire charge from a printed copy.

the court and a jury, the responsibility is evenly divided between the court and the jury. The duty of the court under our form of laws is to declare the law of the case, and it is the duty of the jury to take the law precisely as declared by the court, for, if there be any mistake made in a matter of law, it is the mistake of the court and the court is responsible for such mistake. On the other hand, it is the duty of the jury to determine the facts from the evidence, and if a mistake be made in that matter it is a mistake of the jury and not of the court. The jury must trust the court implicitly to correctly declare the law, and the court must trust the jury to correctly find the facts in a given case from the evidence which is offered and received on a trial of the case before the jury; and if the jury unite the true facts of the case to the law as declared by the court in the verdict returned—whenever that is done, justice in our courts is properly administered; whenever it is not done for any reason, then justice is not properly administered.

Now then gentlemen of the jury I shall endeavor to state to you what it is that we are trying in this case today. In this case Lee Baker was presented to the Grand Jury and the Grand Jury returned an indictment against him in two counts under what is commonly known as the Mann act or White Slave Law that was some time since passed by our Congress. I shall read that law to you in a moment that you may become familiar with its terms. You understand, gentlemen of the jury, in a general way, in framing this Government of ours, the States that were then in existence for themselves, and for all other States that should be created thereafter, framed what we call a Federal Constitution and that the Federal Constitution and the laws of

Congress which are enacted in pursuance of our Constitution are the supreme laws of this country. It is binding upon the States just as well as upon the individuals. In doing that, as I have said, the States that were then in existence, and each State that has come into existence since, has agreed the Constitution and the laws of Congress enacted in pursuance of that Constitution shall be the supreme law of this country. That is the reason that Congress takes control of certain matters which are regulated by Federal law. The States were absolutely incompetent to regulate commerce between the different States, so they committed that matter to Congress, and the Congress of the United States under the Federal Constitution declares all laws and rules which relate to commerce between the several States, among the several States and with foreign countries. Now what is known as the 'White Slave Law' was enacted by Congress under what is known as the commerce clause of the Constitution; that is, it relates entirely to commerce between the different States of this country. Now you know in a general way there are certain matters that the State alone has power to deal with and the Federal Government has no power to deal with. Our States regulate our laws as to marriage and divorce. Our States define in their statutes what is adultery, what is bigamy, what is fornication; all these are matters over which Congress has no control and no concern whatever. It is absolutely impossible in a government situated as is ours for the Federal Government to have anything to say as to how people shall be married, and who are properly married and divorced. It is just as impossible under our form of government for the United States to define the crime of adultery where committed within the borders of a State. It

is a matter of the State's concern. It is for the States to punish for that matter, but it is within the power of Congress to regulate and control interstate commerce, that is, commerce from one State to another.

There are two counts in this indictment based on two distinct offenses which are prescribed by the law, and I will read the law and refer to the indictment. (Reads section.) (2) Section 2 of the act on which is based the first count of this indictment reads as follows: (Reads Section 2.) As I have said to you, the first count of this indictment is based upon the section that I have read; that count reads as follows: * * * present Lee Baker on or about the 28th day of June, 1912, in said District and within the jurisdiction of said Court at the City of Peabody, then and there being did unlawfully, knowingly and feloniously transport or cause to be transported from the City of Peabody in the State of Kansas to the City of St. Joseph in the State of Missouri, one Cora Slover, then and there being a woman under the age of eighteen years for the purpose of prostitution or other immoral practices, the exact nature and character of said prostitution or other immoral practices being to the Grand Jury unknown, he the said Baker furnishing railroad transportation over the Chicago, Rock Island & Pacific Railway from the City of Peabody in the State of Kansas to the City of St. Joseph in the State of Missouri.

Now, gentlemen, this act has not only been held constitutional by the Supreme Court of our country, but the Congress had the undoubted power to enact it for the purpose of regulating and keeping clean commerce between the States under the commerce clause of our national Constitution. The object and purpose of Congress in the passage of this act was to break up the practice of those engaged

in procuring women or girls in one State of our country and transporting or assisting in transporting them into another State to then become inmates of a house of prostitution, or to prostitute their persons in promiscuous sexual intercourse; in other words, to become or engage in the business of a prostitute; again, to prevent any one from transporting or assisting in transporting from one State into another State or Territory of our country any woman or girl under any guise, arrangement or device whatever for the purpose of there debauching or causing such woman or girl to be debauched by sexual intercourse, or other immoral practices which will cause her to live in a state of debauchery; or, to prevent any one from transporting, or assisting in transporting any woman or girl in such interstate commerce from one state to another for any such immoral purpose as will or may lead her into a life of prostitution or debauchery.

This is a criminal prosecution by indictment, hence, it devolves upon the government to make out the case charged in this indictment before you can convict, beyond a reasonable doubt. By that term, reasonable doubt, is meant exactly what it says; a reasonable doubt; such a doubt as will cause a thinking, prudent, reasonable man to hesitate before engaging in the graver or more important affairs of life. When any of the jury have in their minds an abiding conviction the defendant must be guilty as charged,—when they have reached that state of mind—they no longer have any reasonable doubt. The defendant in this case admits he did take this girl Cora Slover at about the time charged from Peabody to St. Joseph in the State of Missouri; that is to say, that he did travel in interstate commerce. He says he was going to the city of St. Joe for the purpose of getting business in his occupation;

that the girl went with him and that it was not his intention when he furnished this transportation, when he engaged in this interstate commerce with the girl that she should engage in prostitution or debauchery, but that they were engaged to be married and expected to be married. He travelled with her to St. Joseph and that they there lived together. *If what the defendant says in that relation is true he is not guilty under this law, because at the time this transportation was entered upon and carried out in this State he must have knowingly furnished this transportation to this girl knowing or intending that she should become a prostitute or should engage in debauchery or such other immoral sexual practice.* Now it is the contention of the Government, and this evidence was offered to show with what mind the defendant furnished this transportation, that this defendant did at St. Joseph, Missouri, request and endeavor to induce others to engage in sexual intercourse with this woman, who is now under this testimony, his wife. Now that was offered for the purpose of showing what his mind was at the time he furnished this transportation, the intent. If he was furnishing this transportation with the intent that she should enter a house of prostitution, or should help him in any way by selling her body, to help him along, then he is guilty under this law. *If, on the contrary, he was going to St. Joseph for the purpose of looking for a position where he could ply his business and that was his honest intent, and the girl wanted to go along, as she says she did, and it was not his intent that she should engage in prostitution, debauchery or immoral practices, then he is not guilty.* The burden of proving this charge beyond a reasonable doubt is on the Government.

There is another section of this statute which I shall read and under the evidence in this

case I find but little or any reason for submitting it. The third section reads: (Reading same.) That section of the statute is meant to cover cases when one entices another to travel in interstate commerce or does things inducing them for the purpose of having them engage themselves in prostitution or in such immoral practices or debauchery as will lead to sexual immorality and eventually to prostitution, but in this case, under the evidence, there is no evidence that he did induce her to go with him. *The evidence is that she was really the one who wanted to go with the defendant; so then as far as the second count of the indictment is concerned there is no evidence of inducing her to accompany him. She says she wanted to go and no one induced her to accompany him. She had no place to stay and wanted to go with him; so the question after all in this case is with what purpose did the defendant furnish this transportation to this girl Cora Slover at the time it was furnished, and what was his intention in that matter at the time that he engaged in this interstate commerce. If he knowingly furnished her transportation and took this girl with him to St. Joseph for the purpose of prostitution on the part of the girl, or that she should there become through himself and others so debauched that she necessarily would become a prostitute, then the defendant is guilty and you will so find; believing the contrary, the Government has failed to convince you that is true as charged in this indictment, then you will find him not guilty. Again, suppose these folks were engaged to be married; suppose he was going to St. Joseph with the legitimate purpose of engaging there in business; suppose this girl wanted to accompany him; if at the time they travelled from Peabody to St. Joseph and his motives were honest and his inten-*

tions toward the girl good; and if he did not intend that she should engage in prostitution or debauchery or other immoral acts after they got there; if that was the intention in his mind at the time he travelled; and after they got there they lived together as man and wife, that was a question for the State authorities of Missouri, and not for the Federal Government, because, as I have said, what constitutes adultery, what constitutes bigamy, and what constitutes living in a state of fornication, all those questions are matters for the State. So what did this man intend? That is the question for your determination. Now, gentlemen, I have said, you are the exclusive judges of the credibility of the witnesses, the weight of the evidence and the facts as proved. Take this case and consider it as far as the law is concerned as I have charged you.

There is another section that doubles the punishment in case the girl furnished the transportation, as in section two, or, is induced to go, as under section three, is under eighteen years. The evidence is, I believe, that the girl at the time this transportation was furnished was under eighteen, but the punishment is left, if you find the defendant guilty, with the discretion of the court between certain extremes.

You will now retire to your jury room and consider the case. I have caused four forms of verdict to be prepared; one relating to each of the two counts of the indictment, one finding the defendant guilty on the first count of the indictment, if you so find; one finding him not guilty on that count, if you so find; also, two forms of verdict relating to the second count in the same manner, and I send the indictment and these four forms of verdict with you." (Italics ours.)

Finally, in urging upon this appellate tribunal the contention, made by us throughout the entire trial of the case in the Court below, that the "White-slave traffic Act", in its intent, scope and operation, was intended by Congress to apply to cases *only* of *commercialized vice*, we remind this Court that the "White-slave traffic Act" is a highly penal statute and that it should be strictly construed, and that, if there be any doubt and ambiguity in some of the verbiage of the Act, that doubt or ambiguity should be resolved against the government and in favor of the individual. As was well said in the case of *Hackfeld v. U. S.*, 197 U. S. 442, 450; 49 L. Ed. 826, 830:

"This is a highly penal statute, and we think the well known rule, as laid down by Mr. Chief Justice Marshall in the case of *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42, is applicable here:

'The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of the individual.' "

In concluding our argument on this phase of the case, we respectfully submit that the facts proven by the prosecution, assuming them to be true, do not bring the defendant within the scope and operation of the "White-slave traffic Act" and that a reversal must follow and the defendant discharged and permitted to go hence without day.

III.

The Trial Court Erred In Charging the Jury, and In Its Rulings Throughout the Trial and During the Arguments of the Prosecuting Attorneys, to the Effect that "If He (Defendant) Has Failed to Deny or Explain Acts of an Incriminating Nature, That the Evidence of the Prosecution Tends to Establish Against Him, Such Failure May Not Only Be Commented Upon but May Be Considered by the Jury With all the Other Circumstances in Reaching Their Conclusion as to His Guilt or Innocence". (Transcript of Record, p. 445.)*

* Note: The record shows that the following proceedings took place, when the giving of the above instruction was assigned as error:

"We likewise, if your Honor please, except to that portion of your Honor's charge wherein you state and advise and instruct the jury that the failure of the defendant while on the stand to explain certain matters contended by the Government to be of an incriminatory nature should be considered by the jury in weighing his testimony. We except especially to the following language of your Honor: 'and if he has failed to deny or explain acts of an incriminating nature, that the evidence of the prosecution tends to establish against him such failure may not only be commented upon but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference'—

The Court. That latter part was not charged.

Mr. Woodworth. Your Honor did not give that?

The Court. No, that last clause was left out.

Mr. Woodworth. Very well, sir. We object to that portion of your Honor's charge." (Transcript of Record, p. 445.)

It should be explained that in the previous trial of the companion case of United States v. Maury I. Diggs (now also before this appellate tribunal for consideration, being case No. 2404, Maury I. Diggs v. United States), the same trial Judge gave the same instruction above set forth but added to it, after the word "innocence", the following: "Since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so." (See Transcript of Record in companion case of Maury I. Diggs v. United States, No. 2404, pp. 390-391.)

In the case at bar, the trial Judge, for reasons of his own and evidently fearing that he had gone much further in instructing the jury in the companion case of Maury I. Diggs v. United States than he had the right to do, eliminated from his subsequent charge in the case at bar the remarks: "Since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

We, however, respectfully submit that the instruction in the case at bar, even in its present emasculated and modified form, is equally erroneous and constitutes reversible error.

These instructions to the jury and the remarks and rulings of the trial Judge, taken in connection with the arguments of counsel for the prosecution, both during the opening and closing arguments, to all of which counsel for defendant vigorously and insistently objected and excepted, operated to the most serious prejudice of defendant, and constitute, we respectfully submit, unquestioned ground for reversal.

In order to appreciate the force of our objections to these instructions to the jury and their damaging effect to the substantial right of the defendant to a fair and impartial trial, it is necessary and proper also to consider, in connection with them, the rulings of the Court in permitting the prosecuting attorneys, both in their opening and closing arguments, to argue to the jury that, because the defendant had not explained or denied certain matters, while on the stand as a witness in his own behalf, this failure to explain or deny could be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence. In other words, if it was substantial error for the trial Judge to instruct the jury as he did, it was equally error on his part to permit the prosecuting attorneys to argue as they did. *E converso*, if it was erroneous for the trial Judge to permit the prosecuting attorneys to argue to the jury that, because the defendant had not explained or denied certain matters, while on the stand as a witness in his own behalf, this failure to explain or deny could

be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence, it was equally serious and reversible error on his part to instruct the jury as he did. It is evident that a consideration of the law applicable to these instructions necessarily involves an examination of the propriety of the rulings of the trial Judge in permitting the prosecuting attorneys to argue, both in their opening and closing arguments, in keeping with the instruction of the trial Judge to the jury. Therefore, the assignments of error applicable to the instructions objected to and to the rulings of the Court and to the arguments of the prosecuting attorneys will all be considered together. These assignments of errors are Nos. 207, 206, 128, 129, 130, 131, 132, 133, 137, 142, 143, 144; Transcript of Record, pp. 445, 439, 440, 415, 416, 417, 418, 419, 421, 422, 423.

In order that this appellate tribunal may thoroughly understand the force of our assignments of error in this regard and may appreciate the pernicious effect of the rulings of the trial Court and of its charge to the jury, we take occasion to set out, in the Opening Brief, in the order of their sequence, first, the objectionable remarks of the prosecuting attorneys, both in their opening and closing arguments, to which exceptions were taken and assignments of error thereafter predicated, and then follow this up with the obnoxious portion of the charge to the jury by the trial Judge, to which

exceptions were duly taken and assignments of error are now urged.

The opening argument was made by Mr. Theodore Roche. At the very outset of his invective against the defendant, he said:

“MR. ROCHE. And we are at liberty to comment on the testimony given by the defendant because he has taken the stand, and for *his failure to deny certain testimony* given by the prosecution, *we can comment on that.*

MR. WOODWORTH. We desire the record at this time, for the purpose of protecting the defendant's rights, to show that we object to counsel *commenting on any failure on the part of the defendant to testify to anything in this case.*

THE COURT. *Proceed.*

MR. WOODWORTH. *We except.*” (Transcript of Record, p. 415; Assignment of Error No. 128.)

Again did Mr. Roche, in his opening argument, commit a similar error, with the sanction and approval of the trial Judge, as follows:

“MR. ROCHE. The defendant took that stand, Gentlemen of the jury, and by *his failure to deny really made admission that he—*

MR. WOODWORTH. We again except to the remarks of counsel.

THE COURT. Mr. Woodworth, I don't understand your numerous exceptions. They certainly have a right to comment on the evidence.

MR. WOODWORTH. Our point is—and I will not make the objection again, let it be understood that the objection I now make runs to all of the argument of counsel, he comments on the failure of the defendant, after he has taken

the stand, to deny certain matters; in other words, counsel in the argument to the jury as to the defendant's failure to deny matters, he makes that comment, and we say that that should not prejudice him.

Mr. ROCHE. Counsel surely is not familiar with the decisions of the Supreme Court of the United States in making a statement of that kind.

The COURT. Of course, if the defendant fails to take the witness stand, then it is perfectly true that no inference unfavorable to him can be deduced therefrom; nor can it be unfavorably commented upon; indeed, it may not be commented on at all. But where a defendant takes the witness stand and gives testimony, then he brings himself within the category of any other witness in the case and his evidence—not only the evidence he gave but that which he *might have given* and *has not* may be *commented* on just exactly as you would comment on the evidence of any other witness.

Mr. WOODWORTH. Of course, we do not agree with your Honor. We do not think that is the law, and we except." (Transcript of Record, pp. 415-416; Assignment of Error No. 129.)

Again did Mr. Roche, in his opening argument, commit the same error, with the sanction and approval of the trial Judge, as follows:

"Mr. ROCHE. They agreed before they left the confines of the State of California and before the train reached Reno, that they would take assumed names and would hire a bungalow at Reno.

Mr. ANTHONY CAMINETTI. That is not the testimony, may it please the Court. You will find the testimony on pages 222-225 of the record. That was *after* they *crossed the State line*.

Mr. ROCHE. I repeat it again, so there will not be any question of your understanding as to what I mean: *Before these parties reached the State line, and before the train passed from the confines of the State of California into the State of Nevada* these two men agreed to take fictitious names, and that these two men at that time made up their minds that just as soon as that train reached Reno they would hire a bungalow in which the four of them were to live. Counsel in his statement virtually admitted that and he said that what happened at Reno was merely incidental and accidental.

Mr. WOODWORTH. I did not say that, Mr. Roche. I said they had determined to leave Sacramento and that what happened after they got to Reno was accidental and incidental.

The COURT. This jury is a jury of intelligent men. If counsel misstate the evidence to them in any way they will be able to determine that. I would not interrupt. Counsel is entitled to a legitimate limit within which to give his views of the evidence.

Mr. WOODWORTH. But he is not entitled to misquote counsel. I said what happened after they arrived at Reno was accidental and incidental.

The COURT. Counsel is characterizing it. I have never observed that these interruptions of this character, unless it is of a very flagrant kind accomplished anything except simply delay.

Mr. ROCHE. That fact has been established by the government, Gentlemen of the Jury, *although the defendant did not undertake to enlighten you on that matter himself.*

Mr. WOODWORTH. We except to that again." (Transcript of Record, pp. 416-417; Assignment of Error No. 130.)

Again did Mr. Roche, in his opening argument, commit the same error, with the sanction and approval of the trial Judge, as follows:

“MR. ROCHE. The defendant testified to a few threats made to him but the defendant has *not denied any of the facts connected with this transaction*, still he asks you to find him not guilty.

MR. WOODWORTH. Again we take an exception.

The COURT. Proceed.” (Transcript of Record, p. 417; Assignment of Error No. 131.)

Evidently, Mr. Roche overlooked, for the moment, the fact that the defendant had entered his plea of “not guilty”, and that this plea placed in issue the question of his guilt, and did not constitute any admission either in fact or law, but on the contrary, was deemed a complete denial of his guilt and a solemn protestation of his innocence. He also overlooked the fact that the defendant was entitled to the presumption of innocence throughout the trial of the case. He also overlooked the fact that the burden of proof was on the prosecution and that this burden never shifts in a criminal case.

Again did Mr. Roche, in his opening argument, persist in the same error, with the sanction and approval of the trial Judge, as follows:

“MR. ROCHE. I thought that Mr. Devlin might put the defendant F. Drew Caminetti on the stand for the purpose of showing that the statements on the train made in the presence of Warren Doan, were false, and that the testimony given here for the government was false, but not so, Gentlemen of the Jury.

Mr. WOODWORTH. Again we except." (Transcript of Record, p. 418; Assignment of Error No. 132.)

Again did Mr. Roche, in his opening argument, repeat and intensify the same error, with the sanction and approval of the trial Judge, as follows:

"Mr. ROCHE. I say that they did not dare—I use that word advisedly—that the defendant did not dare to take the stand and contradict the testimony of these girls.

Mr. WOODWORTH. Again we note an exception." (Transcript of Record, p. 418; Assignment of Error No. 133.)

Somewhat in keeping with the same line of argument, Mr. Roche said a little later on:

"Mr. ROCHE. It is difficult for me to distinguish all of the evidence in this case from all of the evidence in the Diggs case.

Mr. WOODWORTH. We object to any reference to the Diggs case.

The COURT. Yes, the evidence that was before the jury in the Diggs case is not here.

Mr. ROCHE. That is true, but the fact that some of these witnesses testified in the other trial has been made apparent by some of the witnesses here. I do not propose to refer to that testimony, however.

Mr. WOODWORTH. We take an exception." (Transcript of Record, p. 418; Assignment of Error No. 134.)

Again did Mr. Roche, just before the end of his opening argument, repeat insistently the same error, with the sanction and approval of the trial Judge, as follows:

“MR. ROCHE. The defendant did not testify, because the defendant in this case did not undertake to testify to anything that Lola Norris or Marsha Warrington testified to; I am only calling your attention to the conceded facts in this case *because the defendant did not on the stand deny any of the evidence relative to these persuasions and inducements.*

MR. WOODWORTH. We take an exception to counsel again referring to testimony which the defendant did not give.” (Transcript of Record, p. 419; Assignment of Error No. 137.)

The closing argument for the prosecution was made by Hon. Matt I. Sullivan. During the course of a bitter arraignment of the defendant, Mr. Sullivan followed insistently in the footsteps of Mr. Roche and, time and again, took the defendant to task for having failed to explain or deny this or that or some other matter which he, Mr. Sullivan, deemed of an incriminating nature. During all this tirade of scathing denunciation, Mr. Sullivan seemed to be oblivious of the fact that he himself had not asked a single question of the defendant on cross-examination. The prosecuting attorneys did not cross-examine the defendant at all, or ask him to explain or deny any of the matters which, in their arguments, they deemed of an incriminating nature.

“MR. SULLIVAN. *By his failure under oath upon the stand to deny any of the facts upon which the allegations of the first two counts are based he virtually admits them. Here are the admitted facts. He admits that he seduced Lola Norris; he admits that she was an innocent girl before he entered her house under a ficti-*

tious name and stole her from her mother and father; he admits that he was present in Diggs' office one night when Marsha Warrington was made drunk with champagne; he admits that that poor girl was there overcome and seduced by his partner in crime. These are his admissions by his failure to deny.

MR. WOODWORTH. We again except to that language." (Transcript of Record, p. 421; Assignment of Error No. 142.)

We call especial attention to the statement made by Mr. Sullivan, in which he refers to the "allegations of the *first two counts*", inasmuch as the defendant was convicted on the *first* count.

Again did Mr. Sullivan, with the sanction and approval of the trial Judge, commit the same error:

"MR. SULLIVAN. He *admits* that after repeated conferences between himself and Diggs. Lola Norris and Marsba Warrington it was finally agreed that the four should leave Sacramento. *That is admitted. It is admitted* that the defendant at the time of this agreement was a married man and had one child about 4 or 5 years of age and another child five weeks old. *It is admitted by the defendant by his failure to deny* that himself and Diggs agreed to pay the expenses of the trip.

MR. WOODWORTH. An exception, please.

MR. SULLIVAN. *It is admitted by the defendant by his failure to deny*, after proof by the government, that on the 10th day of March, of this year, the four of the party boarded the train of the Southern Pacific Company at Sacramento.

THE COURT. I would like to understand what counsel's exception refers to.

Mr. WOODWORTH. The exception is this, that we consider it a well settled rule of law that a defendant when he takes the stand may be cross-examined, and that it is a violation of his constitutional privilege that he shall not be compelled to be a witness against himself, for counsel to refer to the fact that by his failure to deny certain things he deems them admitted. We have made that objection all along.

The COURT. Yes, exactly, that is what I imagined counsel had reference to. The expression of counsel who is arguing the case that by his silence and failure to deny certain things he has admitted them is *but a form of comment upon his silence*. As a matter of law there is no question but what mere silence does not admit; but it is true under the law that while a defendant cannot be compelled to take the witness stand, that when he does so, *as I shall charge the jury*, he then subjects himself and his evidence to precisely the same character of comment and deduction *by his silence* as would prevail with any other witness. Now that is all that counsel is indulging in and I trust that unless there be some flagrant reason counsel will not constantly interrupt the argument because of course it simply leads to a consumption of time.

Mr. WOODWORTH. I appreciate that.

The COURT. *They are entirely within their rights to comment upon not only the character of the evidence that the defendant did give but that which he might have given, just as with any other witness. I cannot control them in that.*

Mr. WOODWORTH. I appreciate you cannot control them; I appreciate that.

The COURT. I take occasion now to repeat to the jury that it is not in law an admission of facts because one fails to deny them; that is. I mean so far as the evidence from the witness

stand is concerned. The rule which obtains with reference to pleadings does not apply to evidence, and therefore I suggest to counsel that if it accords with his ideas as to the form of his argument that you refrain from using the term '*it is admitted by the defendant.*'

MR. WOODWORTH. That is very offensive, your Honor." (Transcript of Record, pp. 421-423; Assignment of Error No. 143.)

In spite of this admonition from the trial Judge, Mr. Sullivan persisted in indulging in the same kind of argument. It is true that he refrained from using the term "*It is admitted by the defendant*", but he made use of another expression, which amounted to practically the same thing. He used the expression "*It was proved by the government and not denied or attempted to be denied by the defendant*". Obviously, there was no difference between the two statements. One was tantamount to the other. Mr. Sullivan changed the *form* of his statement but not the *substance*. In doing this, he was not rebuked by the trial Judge but was permitted to continue his argument along the same line in spite of the renewed protests and exceptions taken by the attorneys for defendant to this course of argument and to the rulings of the Court thereon.

For instance, immediately following the admonition of the Court to "refrain from using the term '*it is admitted by the defendant*'," and disregarding, without any rebuke or check from the trial Judge, this admonition, Mr. Sullivan said:

“Mr. SULLIVAN. It was proved by the government and *not denied or attempted to be denied by the defendant*, that the four parties boarded the train on the 10th of March of this year; that Diggs paid the price of the tickets before boarding the train; that Diggs bought the Pullman tickets, and so forth. These facts were proved by the government and *not denied by the defendant because he took the stand in his own behalf and he had an opportunity of denying them.*

Mr. WOODWORTH. We except.” (Transcript of Record, p. 423; Assignment of Error No. 144.)

It will not be seriously doubted, for a moment, that the argument of Mr. Roche, in his opening speech, and of Mr. Sullivan, in his closing address, approved and supported by the remarks and rulings of the trial Judge who permitted the comments referred to above, and who even went so far as to announce to counsel in the presence of the jury that at the proper time he would instruct the jury in consonance with the arguments of the prosecuting attorneys, were highly prejudicial to the substantial rights of the defendant, deprived him of a fair and impartial trial, robbed him of the presumption of innocence, placed an undue burden upon him, and, in effect, required him to prove his innocence, and misled the jury and placed him in a most unfavorable light before the jury.

This prejudice was incalculably accentuated by the trial Judge in his instructions to the jury. We take the liberty of setting out a considerable portion

of the Court's charge to the jury (also covered by Assignments of Error Nos. 206-207) immediately preceding that part which we deemed most highly objectionable, so that this appellate tribunal will fully understand and appreciate the force of the trial Judge's erroneous instructions on this subject and the deep and prejudicial effect against the defendant such charge must have had upon the minds of the jury.

This portion of the charge to the jury is as follows:

“As has been stated to you by defendant's counsel in their argument, one of the most material facts left in the case for your determination in reaching a verdict is as to the purpose or intent with which these girls were transported to Reno on the occasion in question, should you find that they were so transported. Upon this question the defendant has introduced the evidence of several witnesses, and has himself testified, to facts tending to show certain threats emanating from the father of Maury I. Diggs, and the wife of the latter, and others, and communicated to himself and his companion Diggs, from which it is claimed that their sole actuating motive in leaving Sacramento was to escape arrest and exposure and possible personal violence at the hands of the father of one of the girls. This evidence is all before you for your consideration in connection with the other evidence in the case bearing upon that subject. *The defendant, however, in his testimony, did not in any express or direct way touch upon the Reno trip, or specifically state what his purpose or intent was in taking these girls, or either of them, with him, if you find they were so taken. Nor has he testified*

as to what the facts or incidents of that trip were,—confining himself to a statement of certain things occurring before that trip was taken, and their effect upon his state of mind. Now it was the defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony. *But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, as has been stated to you by counsel for the government, to take this omission of the defendant into consideration.* A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but where a defendant elects to go upon the stand and testify, he then subjects himself to the same rule that applies to any other witness, *and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusions as to his guilt or innocence.*" (Transcript of Record, pp. 439-440; Assignment of Errors Nos. 206, 207.)

This charge to the jury, in connection with the arguments of the prosecuting attorneys above referred to and the rulings of the trial Judge permitting such arguments, and particularly the parts set out in italics, constitute very serious and re-

versible errors. The instruction itself does not state a correct rule of law, and the giving of it was a material and substantial error.

As stated in the leading case of *Balliet v. United States*, 129 Fed. Rep. 689, 695:

“We are satisfied that the instruction cast an *undue burden on the defendant*, and that it was also *misleading*. Moreover, we are not able to say with certainty, as we must be to uphold the verdict, that *the defendant was not prejudiced by the instruction*. The judgment below is accordingly *reversed*, and the case is remanded for a new trial.” (Italics ours.)

This is a decision by the Circuit Court of Appeals for the Eighth Circuit and the instruction in that case is substantially similar to the objectionable instructions given in the case at bar. It was as follows:

“It has been suggested that I have overlooked one thing. I may say you may consider, in determining the question, the fact that the defendant having gone upon the witness stand, *if he has not fully explained, or has not explained matters which are material to the issues in this case*, and which are *naturally within his knowledge*, you may consider that as a circumstance tending to show that the facts, if explained etc., would bear out the contention of the government, and his failure to explain them or give a truthful explanation is against him.” (Italics ours.)

The Circuit Court of Appeals for the Eighth Circuit said, of this instruction:

“We have not been able to conclude that this instruction states a correct rule of law, or that

the giving of it was not a material error. As we interpret this instruction, it means that inasmuch as the defendant had elected to testify in his own favor, if while on the stand he had not fully explained all matters and things material to the issue in the case which the jury might think were naturally within his knowledge, then the jury might conclude that the facts, etc., if he had indulged in an explanation concerning them, would have borne out the contention of the government—that is, shown that he was guilty—and that his failure to explain was against him; that is, would justify a conclusion of guilt. This rule of law would put the defendant in a criminal case in a peculiar attitude, for if he takes the stand as a witness he must perforce explain every fact and circumstance which has been put in evidence against him, as tending to establish guilt, which a jury may deem material, and such as he could explain, at the risk of having them conclude, because of his silence as respects such facts and circumstances, that they are true and that he is guilty. If a defendant in a criminal case desires to take the stand and contradict some particular fact or circumstance that has been testified to, he cannot safely do so for fear of raising a presumption of guilt by his failure to explain other facts and circumstances in evidence which the jury may happen to regard as material and may think the accused could explain. The federal statute (Act March 16, 1878, c. 37, 20 Stat. 30 (U. S. Comp. St. 1901, p. 660)) provides, in substance, that a person charged with an offense ‘shall at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.’ When the defendant in a criminal case, in compliance with this statute, waives his constitutional privilege by taking the witness stand, he occu-

pies the attitude of any other witness, and may be cross-examined like an ordinary witness, and to the same extent. *Fitzpatrick v. United States*, 178 U. S. 304, 315, 20 Sup. Ct. 944, 44 L. Ed. 1078. The federal statute does not, like the statutes of some states (*vide Rev. St. Mo.* 1899, Sec. 2637), expressly provide that the examination of the accused shall be limited to the matters testified to on his direct examination, but we apprehend that it should be so limited, because that is the general rule which obtains in the federal courts relative to the cross-examination of all witnesses except, when the rule is relaxed, as it sometimes is, on grounds of convenience or necessity. *Houghton v. Jones*, 1 Wall. 702, 706, 17 L. Ed. 503; *Wills v. Russell*, 100 U. S. 625, 626, 25 L. Ed. 607; *Montgomery v. Aetna Life Ins. Co.*, 38 C. C. A. 553, 97 Fed. 913; *Goddard v. Creffield Mills*, 21 C. C. A. 530, 75 Fed. 818; *Safter v. United States*, 31 C. C. A. 1, 87 Fed. 329. It is also doubtless true that, when a defendant in a criminal case takes advantage of the statute and testifies in his own favor, the government may comment on his testimony and draw inferences therefrom as freely as if he were an ordinary witness and not the accused. It is only where the accused fails to testify that the statute prohibits unfavorable comment and attempts to create a presumption against him because he has not done so. Conceding this much, we are nevertheless of opinion that the instruction in question went too far, in that it required the accused to explain every fact and circumstance which had been introduced against him, and gave to them additional probative force because he had not done so or attempted to do so. Furthermore, it left the jury at full liberty to determine what matters which had been given in evidence were 'material to the issues in the case', without direction on that

point, and equal liberty to determine what matters were 'naturally within his knowledge' and susceptible of explanation. The testimony in the case had taken a very wide range and covered a considerable period of time. While on the stand some facts and circumstances that had been introduced in evidence may have been overlooked by the accused or by his counsel, and he may not have been interrogated with respect thereto for that reason, or they may have been regarded as of no importance, or the circumstances may have been of a character which admitted of no further explanation, being in themselves such circumstances as the jury could ignore or draw such inferences therefrom as they thought proper. And yet the instruction was of a nature which permitted the jury to draw unfavorable inferences against the accused, because in the course of his examination he had not alluded to every fact and circumstance already in evidence, and given an explanation thereof consistent with his innocence. We are satisfied that the instruction cast an undue burden on the defendant, and that it was also misleading. Moreover, we are not able to say with certainty, as we must be to uphold the verdict, that the defendant was not prejudiced by the instruction.

The judgment below is accordingly reversed, and the case is remanded for a new trial."

In a concurring opinion, Circuit Judge Sanborn was even more forcible in his criticism of the instruction in that case and went further than the judges who delivered the majority opinion would go. The learned Judge said:

"I concur in the result, and in the opinion in this case, with this exception: The opinion contains the statement that it is the general rule

in the federal courts relative to the examination of all witnesses, except when the rule is relaxed, as it sometimes is, on grounds of convenience or necessity, that the cross-examination must be limited to the matters testified to upon the direct examination of the witness. I concede the general rule, but I do not understand that it is discretionary with the federal courts to relax the rule, on the ground of convenience or necessity, so far as to permit a cross-examiner to cross-examine a witness, produced by his opponent, upon subjects not germane to those upon which he was examined in chief. *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.* (C. C. A.), 129 Fed. 668; *Houghton v. Jones*, 1 Wall. 702, 706, 17 L. Ed. 503; *Montgomery v. Aetna Life Ins. Co.*, 97 Fed. 913, 916, 38 C. C. A. 553, 557; *Safter v. U. S.*, 87 Fed. 329, 330, 31 C. C. A. 1, 2; *Mine & Smelter Supply Co. v. Parke & Lacy Co.*, 107 Fed. 881, 884, 47 C. C. A. 34, 36; 1 *Greenleaf Ev. Sec.* 445; *Hopkinson v. Leeds*, 78 Pa. 396, *Fulton v. Bank*, 92 Pa. 112, 115. A rule which may be relaxed by the court when in its opinion it is necessary or is convenient to relax it is no rule at all. Such an exception is the abrogation of the rule because it leaves its controlling force and effect in every case to the discretion of the trial court. In my opinion the rule has not been so abrogated by the federal courts, and it ought not to be so destroyed. This rule rests upon a sound reason, which varies not, at the discretion of the court, by reason of convenience or necessity. It exists because a witness during his cross-examination is the witness of the party who calls him, and not the witness of the party who cross-examines. *Wilson v. Wagar*, 26 Mich. 452, 458; *Campau v. Dewey*, 9 Mich. 381. The cross-examiner has the right to bind his opponent by the testimony of the witness upon cross-examination relative to every subject con-

cerning which his opponent examined him in the direct examination. But he has no right to bind his opponent by the testimony of the witness during the cross-examination upon subjects relative to which his opponent did not examine him. If he would examine the witness upon such subjects, he may and he must make him his own witness, and stand sponsor for the truth of his testimony. It is discretionary with the court to permit the cross-examiner to do this at the time he is conducting the cross-examination, because the time and the manner of the trial are within the discretion of the court. It is discretionary with the trial court to permit leading questions to be put to a hostile witness upon his direct examination. But in the federal courts the line of demarkation which limits a rightful cross-examination is clear and well defined. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify. It exists because within that line the party who calls the witness stands sponsor for the truth of his testimony, while without that line he does not. It does not vary with any convenience or necessity of court or counsel, because no convenience or necessity can be conceived of which would not enable the cross-examiner to make the witness his own and take the chance of his testimony. For these reasons I adhere to the general rule upon this subject, but am unable to concede the correctness of the exception thereto stated in the opinion."

These able opinions of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Balliet v. United States*, are most convincing and are directly applicable to the case at bar. While the phraseology

of the erroneous instruction in the case cited is somewhat different from those involved in the case at bar, still the instructions amount to substantially the same thing. In the case cited, the jury was instructed that “if he has *not fully explained*, or has *not explained matters which are material to the issue in this case*, and which are naturally within his knowledge, you may consider that as a circumstance tending to show” etc.; and, in the case at bar, the jury was instructed that “if he (defendant) has *failed to deny or explain acts of an incriminating nature*, that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon but may be considered by the jury with all the other circumstances in reaching their conclusion, etc.”

Both of these instructions practically charged the jury that the failure of the accused to explain or deny was a circumstance indicative of guilt. Not only are such instructions *erroneous* but, as was pointed out in the case of *Balliet v. United States*, they are *misleading*. In the case cited, the instruction “left the jury at full liberty to determine what matters which had been given in evidence were ‘material to the issues in the case’, without directions on that point, and equal liberty to determine what matters were ‘naturally within his knowledge’ and susceptible of explanation”. In the instructions involved in the case at bar, the trial Judge made no attempt whatever to direct the jury as to what matters were “acts of an incriminating

nature that the evidence of the prosecution tends to establish against him". This left the jury at full liberty to determine what were "acts of an incriminating nature that the evidence of the prosecution tends to establish against him".

The testimony in the case at bar had taken a wide range and covered a considerable period of time. The trial covered practically two weeks, consuming eight actual court days. About thirty witnesses were examined on both sides. The transcript of the testimony, excluding arguments of counsel and the charge of the Court to the jury, amounted to 568 pages of typewritten matter. The trial Judge admitted a great deal of testimony for the purpose of throwing light upon the relations of the defendant with Lola Norris, and also upon the relations of Maury I. Diggs with Marsha Warrington, for a considerable time previous to their departure from Sacramento on the trip to Reno. The trial Court permitted the prosecution to exploit very fully the occurrences attending the trip from Sacramento to Reno as well as what transpired after the arrival at Reno and during their occupancy of the bungalow at Reno up to the time of their arrest by the California state authorities, and, even after their arrest, down to the time of their return to Sacramento. It is inconceivable that the jury could have intelligently selected from this mass of evidence all those "acts of an incriminating nature that the evidence of the prosecution tends to establish against him", and which, it was claimed, he, the

defendant, had failed to deny or explain, without some specific directions on the subject by the trial Judge, in connection with the giving of these particular instructions, of which the defendant now complains.

But, aside from the instruction being *misleading*, as above pointed out, it was radically *erroneous*. It was violative of the defendant's constitutional right not to be compelled to be a witness against himself; it was violative of the presumption of defendant's innocence; it was subversive of the doctrine of reasonable doubt, to which the defendant was entitled; it practically shifted and placed the burden of proof upon him; it placed an undue burden upon him; the jury was practically instructed that his failure to explain or deny matters, as to which it appears, however, he was not asked a single question either on direct or cross-examination, was a circumstance indicative of guilt. The vice of the instruction consisted in the fact that the trial Judge charged the jury that they might consider the failure of the defendant to deny or explain acts of an incriminating nature in determining his guilt, when it affirmatively appears that he was not asked to deny or explain any of the matters of an incriminating nature to which the attorneys for the prosecution alluded in their opening and closing arguments. *He was not cross-examined at all.* (Transcript of Record, p. 407.)

Article V of the amendments to the constitution of the United States expressly provides that:

“No person * * * shall be compelled in any criminal case to be a witness against himself.”

The Act of Congress of March 15, 1878 (20 Stat. at L. 30, chap. 37) provides:

“That in the trial of all indictments, information, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory including the District of Columbia, the person so charged shall at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.”

Boyd v. United States, 116 U. S. 616.

It is elementary and fundamental law of the land that a person accused of crime is presumed to be innocent.

Coffin v. United States, 156 U. S. 432;

Kirby v. United States, 174 U. S. 47.

The burden of proof is always upon the prosecution. This burden of proof *never shifts* in a criminal case. The issue is always single, and it relates, not to the defendant's *innocence*, but to his guilt.

Coffin v. United States, 156 U. S. 432;

McKnight v. United States, 115 Fed. Rep. 972;

Balliet v. United States, 129 Fed. Rep. 689;
 People v. McWhorter, 93 Mich. 641;
 Baker v. State, 80 Wis. 421.

The prosecution may adduce evidence sufficient to establish guilt, but the defendant is not called upon to aid them. When the prosecution rests, the case must be made out. If then a conviction is not justified, the failure of the defendant further to weaken the already weak case of the prosecution will not strengthen it. The requirement that his guilt shall be established beyond a reasonable doubt, and that he shall be presumed innocent until proven guilty, are safeguards which our law has wisely thrown about every person charged with crime, *but they were each of them denied to the defendant in this case by the erroneous instructions above set out.*

In the United States Courts and in the Courts of some of the states, independently of statute, and especially in California, the right of cross-examination is restricted to matters inquired of in chief.

12 Cyc., 577, 578;
 People v. McGungill, 41 Cal. 429;
 People v. Sanders, 114 Cal. 216;
 State v. Elmer, 115 Mo. 401; 22 S. W. 369;
 State v. Fairlamb, 121 Mo. 137;
 State v. Baldsoer, 88 Iowa 55;
 Balliet v. United States, 129 Fed. 689;
 United States v. Mullaney, 32 Fed. 370;

Sec. 13, Art. I, Const. of Cal.;

Sec. 1323, Cal. Penal Code.

In the case of *United States v. Mullaney*, just cited, Mr. Justice Brewer said:

“Of course, cross-examination is, in the Federal Courts, limited to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony.”

Wherever this rule obtains, and this rule obtains in both the federal and state courts in California, it is held that the defendant *waives no right and surrenders no presumption* in going upon the stand, except as to *matters testified to in chief*. As to these, he may be fully cross-examined as any other witness may be. If he testifies falsely, or fails or refuses to answer proper questions put to him on cross-examination, he must bear the consequences. His manner upon the stand, his demeanor in answering questions, his hesitancy, his frankness, his failure to deny or explain matters as to which he is asked proper questions on cross-examination, these, and other matters going to his credibility, may undoubtedly be adverted to and commented upon by the attorneys for the prosecution as well as by his own counsel in their arguments to the jury. Where, however, he does *not go into a subject*, where he does *not testify at all as to a particular matter*, where he *leaves it as the prosecution left it*, where he is *not asked a single question on cross-examination*, the case

as made against him derives no support from *his silence*. The fact, therefore, that defendant went upon the stand in this case did not justify the instructions complained of.

The rule is thus summarized in Cyc., Vol. 12, pp. 577, 578:

“In those states where the accused is subject to cross-examination only as to those matters testified to on his direct examination, the prosecution *cannot comment upon his silence on cross-examination as to matters not touched upon in direct examination.*”

See, also,

Cooley Const. Lim., (6th ed.) 384-386;

State v. Lurch, 12 Oregon 99;

State v. Graves, 95 Mo. 510;

People v. O'Brien, 66 Cal. 602;

Gale v. People, 26 Mich. 157;

Fitzpatrick v. U. S., 178 U. S. 304;

Balliet v. United States, 129 Fed. Rep. 689.

As to his examination and cross-examination, the defendant stood as any other witness in the case, but he was still within the protection of the constitution, and not required to furnish evidence against himself.

It is clear that the prosecuting attorneys had no right to interrogate defendant concerning anything not relevant to his examination in chief, and for the stronger reason, the trial Judge had no right to comment or instruct where the prosecutor could not inquire, and the jury should not have been

directed to draw adverse inferences from a reserve which the law holds sacred against intrusion.

The instruction then, finds no excuse in the fact that the defendant took the witness stand, and, in addition to the objections already urged, there is the grave objection that it practically shifted and placed the burden of proof upon him and called upon him to exculpate himself. Stripped of its excusatory qualification and its repetitions, it charges baldly: "If the defendant has failed to deny or explain acts of an incriminating nature, that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence;" in effect, instructing the jury that failure to explain or deny would bear out the contention of the government and indicate the guilt of the defendant.

Failure to explain can be against any one only when there is an obligation to explain. To found an adverse presumption upon such failure is to impose an obligation to explain. The party is forced to testify. Though silent, he speaks, and speaks in condemnation of himself. In this case the facts shown did not, as matter of law, prove the guilt. That remained a question of fact to be determined in view of the inherent, natural tendency of the facts upon the one side, and against

this was always to be considered, even though there was nothing more, the *presumption of defendant's innocence*. *This presumption was evidence in favor of the accused*.

Coffey v. U. S., 156 U. S. 432;

Kirby v. United States, 174 U. S. 47.

We deny that from defendant's silence on any particular matter or matters any presumption whatever was to be indulged against him. Had he not taken the stand at all, there would be no doubt as to this. But the Court assumed that, because he went upon the witness stand, he must fully deny or explain *every act of an incriminating nature, that the evidence of the prosecution tended to establish against him*, and if he did not, that this was to be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence. This was practically shifting the burden of proof on the defendant and was placing an undue burden on him and was deeply prejudicial to his substantial rights.

It is to be observed, from the record, that the prosecuting attorneys did not cross-examine the defendant at all. He answered every question put to him on his examination in chief and which the Court permitted him to answer. He was not silent as to anything he was asked and which his own counsel deemed to be material. They, presumably, examined him as far as they thought

necessary, and if, by inadvertence, or oversight, or misconception of what was material, they omitted anything, no presumption should be indulged against him.

But the defendant, having the right to remain silent altogether and there being no presumption against him because of his silence, what was the consequence of his testifying at all? Simply this—he put himself in the position of a witness and *exposed himself to PROPER cross-examination.*

The leading case of *Fitzpatrick v. U. S.*, 178 U. S. 304; 44 L. Ed. 1078, 1083, clearly lays down this rule and points out the line of demarcation between matters upon which it is proper to cross-examine a defendant and matters which it is not proper. It lays down the well-settled rule that the cross-examination of a defendant, like any other witness, is *limited to the matters inquired of on direct examination*, and that it is *only* in a case of a refusal by a defendant to answer a *proper question put upon cross-examination* that that is a *proper subject of comment to the jury*. The Supreme Court used the following language:

“Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a *right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness*, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from

his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a *cross-examination upon those facts*. The witness *having sworn to an alibi*, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defense, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a *proper question put upon cross-examination has been held to be a proper subject of comment to the jury* (State v. Ober, 52 N. H. 459); and it is also held in a large number of cases that when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses. *If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of State v. Lurch, 12 Or. 99, 6 Pac. 408, is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. State v. Saunders, 14 Or. 300, 12 Pac. 441, is also authority for the proposition*

that he cannot be compelled to answer as to any facts not relevant to his direct examination."

We shall have occasion, farther on in this Opening Brief, to refer at length to both the authorities of *State v. Lurch*, 12 Or. 99; 6 Pac. 408, and *State v. Saunders*, 14 Or. 300; 12 Pac. 441, cited approvingly by the Supreme Court of the United States in the case, just referred to, of *Fitzpatrick v. United States*.

As has already been pointed out, in the United States Courts and in the Courts of the State of California the right of cross-examination is restricted to matters relevant to those inquired of in-chief and, wherever this latter rule obtains, it is held that the defendant waives no right and surrenders no presumption in going upon the stand, except as to matters testified to in chief. Especially should this be the rule where it appears, as it does in the case at bar, that the prosecuting attorneys did not see fit to cross-examine the defendant at all or ask him a single question. Yet, upon the arguments, they had the temerity to appeal to the jury to convict him because he failed to deny or explain this or that or some other matter which they, the prosecuting attorneys, deemed relevant and material and as to which they either did not wish, or had no right, to cross-examine him at all. They argued to the jury that defendant admitted his guilt by failing to deny or explain, and the trial Judge permitted them so to argue in face of the

fact that they had not attempted to ask him a single question on cross-examination.

The instructions, in practical effect, put upon defendant the burden of proving his innocence of the charge against him, and more than this, required him to vindicate himself against every imputation, however irrelevant, suggested by the testimony, whether by direction or indirection.

What is it that the defendant is called upon by these instructions to fully and truthfully deny or explain?

The instructions answer for themselves: "Acts of an incriminating nature, that the evidence of the prosecution tends to establish against him."

The instructions, in effect, assume that the evidence "tends to establish" acts of an incriminating nature. But it was for the jury to say whether there was any evidence or not tending to establish acts of an incriminating nature against him.

Furthermore, what were the "acts of an incriminating nature, that the evidence of the prosecution tended to establish against him"?

Here are qualifications or limitations without which the explanation called for would be wide as the realm of human knowledge.

Substantially everything in evidence, at least on the part of the prosecution, is assumed to relate to "acts of an incriminating nature". The instructions specify nothing within the record, as to what were the "acts of an incriminating nature

that the evidence of the prosecution tended to establish against him", and it excluded nothing therein. Nothing contained in it, however incidentally brought in, but the jury may consider it, for the jury are not judges as to what constitutes materiality—that is for the Court—but the Court turned them adrift without chart or compass to guide them. They must accept everything in evidence as relevant and material to the issue.'

In *Leonard v. Washington*, 2 Wash. Terr. 381; 7 Pac. 872, the jury was instructed "that the fact that defendant does not disprove circumstances proved before them will give additional weight to such circumstances that are proved, if the jury believe the defendant has the means of disproving them if they be false".

The Supreme Court of the Territory of Washington said, of this instruction given by the trial Court:

"This also is objected to as erroneous, and we deem the *objection sound*. It is assumed by this language that circumstances have been proved, whereas it is for the jury to say whether any have been proved or not. Moreover, by it the jury are charged that the defendant's *failure to disprove* will give additional weight to circumstances proved; whereas in truth the failure does not necessarily add weight to anything, but only brings into the case an additional circumstance of greater or less significance, namely, the failure itself; which circumstance is to be received by the jury for whatever on the whole it is worth, and may or may not combine with the other cir-

cumstances in the case, adding its weight to theirs, so that they with it will weigh more than they would alone.

As to any failure on the part of defendant himself to testify, we doubt whether the instruction is sufficiently qualified to the apprehension of the jury by another correct instruction, afterwards given, to the effect that the jury should draw no inference of guilt against the defendant from his failure to testify in his own behalf.

The code provides 'that it should be the duty of the Court to instruct the jury that no inference of guilt *shall arise* against the accused, if the accused shall *fail* or *refuse* to testify as a witness in his or her own behalf'. (Code of 1881, Sec. 1067.)

We think that the spirit of this provision demands that the failure of the defendant to testify *as to any point* shall not operate to his disadvantage *in any branch or aspect of the case.*" (Italics ours.)

In the same case, Turner, Associate Justice, in a separate opinion, said:

"I agree that that instruction is error, but I think it is error because it directs the jury *to consider the failure of the accused to offer evidence in his defense*, for the purpose of assisting them to remove a reasonable doubt of his guilt, when, under the law, he is in no case required to offer evidence until his guilt is established beyond a reasonable doubt. In other words, *I do not think the failure of an accused person to offer evidence can, in any case, be considered by the jury as a circumstance to determine, or to assist in determining, his guilt.*" (Italics ours.)

If it is error to permit a prosecuting attorney to examine a defendant, when upon the witness stand, upon matters not testified to by him in his evidence in chief, it is certainly equally erroneous for the prosecuting attorney to comment upon matters which could not properly be elicited upon such cross-examination and, if that be so, it is equally highly improper for the trial Judge to instruct the jury that they may take into consideration, in reaching their conclusion as to the guilt or innocence of the defendant, the fact that he has failed to deny or explain acts of an incriminating character, as to which he could not properly be interrogated on cross-examination.

This proposition was lucidly stated by the Supreme Court of the State of Oregon in the case of *State v. Lurch*, 12 Oregon 99, 102. The Court there said:

“The Circuit Court, however, did commit error in permitting counsel for the State to examine the appellant, when upon the witness stand, upon matters not testified to by him in his evidence in chief, and in requiring him to write his name and other names, as before suggested. The statute of the State, which allows the accused in such a case to be a witness, provides that when he offers his testimony as a witness in his own behalf, he shall be deemed to have given to the prosecution a right to cross-examine him upon all facts to which he has testified, tending to his conviction or acquittal. (Laws 1880, pp. 28, 29.) But this does not compel him to be a witness against himself beyond such cross-examination. The humane principle of the law, that a party shall

not be compelled to be a witness against himself, otherwise remains in full force, and is as effectually violated when the cross-examination of the accused is extended beyond the facts to which he has testified, as it would be if he were to be called and made to testify at the instance of the State. The object and purpose of the statute referred to were to afford an opportunity to the accused to relate his account of the transaction in which he is alleged to be implicated, and it would be a great violation of good faith to permit the State to take advantage of his situation and change the trial into an inquisition. The cross-examination in such case must be strictly confined to the facts testified to by the accused. The law throws around him in such case an immunity which ought to be sacredly maintained."

The Court, in closing its opinion, used the following significant language, which we deem peculiarly applicable to the case at bar:

"Where the error consists of an infraction of a constitutional guaranty in favor of personal liberty, such as the *compelling a party accused of a crime to be a witness against himself*, the law will *presume an injury*, and the Court will have no alternative but to adjudge accordingly. The judgment appealed from will therefore be reversed, and the case remanded for new trial."

This is one of the authorities referred to approvingly by the U. S. Supreme Court in the case of *Fitzpatrick v. United States*, *supra*.

The remarks of the Supreme Court of Michigan in the case of *Gale v. People*, 26 Mich. 156, 160, 161,

forcibly illustrate our contention. The Court there said:

“Few men, however innocent, could safely go upon the stand to answer a criminal charge, if they must, at their peril, be prepared to give satisfactory answers to questions regarding their whole former life, or, if they decline to do so, have their triers informed that the information they declined to give, it was proper for the prosecution to call out, and that the refusal to respond to the questions justly subjected them to unfavorable inferences.”

The case of *State v. Graves*, 95 Mo. 510, is directly applicable and it was held that it is error to allow the prosecuting attorney, over the objections of the defendant and without rebuke from the Court, to comment upon what the defendant might have testified about, but did not, when on the witness stand.

This decision applies directly to the conduct of the prosecuting attorneys in the case at bar in repeatedly urging upon the jury, without any rebuke from the trial Judge, but on the contrary on occasions with his approval, the fact that the defendant might have testified about certain matters, but did not, when on the witness stand.

During the course of an able opinion, the Supreme Court of Missouri said (at page 513 et seq.):

“The defendant offered himself as a witness and testified as follows: ‘I never received any bottle of medicine of Hub Wright; had nothing to do with it.’ This was the whole of his evidence. The prosecuting attorney in his closing

argument was permitted by the Court without rebuke (although objection was made) to comment on the fact that defendant, when on the stand, could have told where he was on the night of the larceny, but failed to make any statement as to where he was. We are asked to reverse the judgment on this ground, and this brings up the question as to whether or not the prosecuting attorney, in commenting upon the evidence given by a defendant in a criminal case who testifies in his own behalf, is confined to what he swore to on his examination, or whether he may, in addition to making comments on what he swore to, also comment on what he might have sworn to, but did not swear to.

By Revised Statutes, Section 1918, it is provided that a defendant criminally charged may testify in his own behalf and 'shall be liable to cross-examination as to any matter referred to in his examination in chief'. By Section 1919, it is provided that 'if the accused shall not avail himself or herself of his or her right to testify * * * it shall not be construed to affect the innocence or guilt of the accused, nor be referred to by any attorney in the cause, nor be considered by the Court or jury before whom the trial takes place.' Under these statutory provisions it is clear that a defendant who offers himself as a witness cannot be cross-examined except as to such matters as may be referred to by him in his examination in chief, and it would seem to follow necessarily from this, that the comments on his evidence should be confined to such matters as he testified about in his examination in chief and cross-examination. If a cross-examination is limited only to such matters as the witness testified to in chief, upon what principle can the right be maintained to comment in argument upon matters about which a cross-examination under the statute would not have been allowed?

The statute having conferred the right upon such a defendant when he takes the stand to testify only in regard to such matters as he may choose, this right of choice would in effect be taken away by a ruling which would justify comments to be made, and unfavorable inferences to be drawn from what he might have testified about, but about which he did not testify. Under this statute the defendant has two options, the first of which is that he may elect either to go on the stand or not, as a witness; and second, when he elects to go on the stand he may testify only to such matters as he may choose. It is clear that, under the statute, if he elects not to go on the stand, the fact that he did not testify at all could 'neither be construed' to affect his innocence or guilt, nor be referred to by any attorney in the case.

If the statute forbids comment upon what he might have sworn to when he elects not to go on the stand, why does it not *in its essence and spirit*, when he elects to testify, also forbid comment upon *what he might have sworn to while on the stand and which he elected*, as under the statute he had the right to do, *not to testify about?* * * * It has been held in a number of cases, that when a trial Court allows such a defendant to be cross-examined as to matters not referred to, in his examination in chief, that such action would be reversible error. And if that would be reversible error, *why would it not be reversible error to allow comment to be made upon what would be reversible error if brought on cross-examination?*

In the present case the defendant only testified to the fact that he never 'got any bottle of medicine from Hub Wright and had nothing to do with it'. Now, if, on his cross-examination, he had been asked, 'where were you on the night this larceny was committed?' and he had been required to answer over his objection, and

had answered he was in Hermitage, or if he had been asked, 'were you at Cross Timbers on the night of the larceny?' and he had answered that he was not, and the prosecuting attorney had or not commented on this evidence thus brought out, under our rules in the following cases the judgment, if rendered against him, would have to be reversed: *State v. Porter*, 75 Mo. 171; *State v. Douglass*, 81 Mo. 231; *State v. McLaughlin*, 76 Mo. 320; *State v. Patterson*, 88 Mo. 88; *State v. Chamberlain*, 89 Mo. 129. In the case last cited it is said: 'And it has been uniformly held that no questions can be asked the defendant on cross-examination except of the character designated by the statute. In this instance the questions propounded to the defendant were altogether beyond the confines of the statute. This error must cause a reversal.'

If it is reversible error to enquire on cross-examination about a matter not referred to in the examination in chief, why is it not reversible error if the prosecuting attorney comment upon a matter concerning which, if the defendant had been required to testify, the judgment would be reversed? Any other ruling or construction of the statute would necessarily have the effect of compelling a defendant in a criminal case either to elect not to go on the stand at all as a witness, or if he elected to go on the stand, to compel him to testify fully in regard to all matters connected with the charge, even though he might thereby criminate himself.

For the error committed in allowing the prosecuting attorney to comment without rebuke (after the attention of the Court had been called to it) as to what defendant might have testified about, but did not testify about, the judgment will be reversed and the cause remanded.' (Italics ours.)

This authority is directly applicable to the situation in the case at bar for, as we have seen, it is the well settled rule in the federal Courts and in the Courts of the State of California, that the right of cross-examination is restricted to matters inquired of in chief.

In the case of *State v. Saunders*, 14 Oregon 300; 12 Pac. 441, 444, 445, it was held to be error to permit the accused to be asked on his cross-examination questions not relating to facts to which he had testified on his examination in chief with a view to discrediting him.

The language employed in this case is so illustrative and apposite, upon the proposition that the cross-examination of a defendant should be limited to matters covered by the examination in chief, that we quote liberally:

“The statute of this state which permits a defendant in a criminal case to offer himself as a witness in his own behalf provides that the offer, when so made, shall be deemed to have given to the prosecution a right to cross-examine him upon all the facts to which he has testified tending to his conviction or acquittal. Laws 1880, pp. 28, 29. The question, therefore, is how far he subjects himself to cross-examination, under that statute. It is very likely that, if the statute contained no limitation as to the extent of the cross-examination of a defendant in such a case, he would occupy the same footing as any other witness, if he chose to take the stand, although some of the decisions from the states in which no limitation is imposed upon the cross-examination hold that the cross-examination of a defendant, in such

a case, should not there be allowed the same latitude permitted in the cross-examination of a witness not a party defendant. The ground of the distinction was an apprehension that the defendant, in such case, might be convicted of one offense upon his admission that he had committed others. *People v. Brown*, 72 N. Y. 571. It seems to me that this distinction is very properly made, conceding that an ordinary witness may be interrogated upon his cross-examination as to whether he has not committed other offenses that cannot affect him beyond his credit in the particular case, unless it expose him to prosecution, and then he can claim his privilege; but, as regards the party accused, such examination operates as a two-edged sword. It would not only impair his credit as a witness, but create a strong prejudice in the minds of the jury against him, and be a material aid towards convicting him. Unless, therefore, a defendant in a criminal prosecution is as pure as the icicles which form on Diana's temple, he had better keep off the witness stand if the prosecution is at liberty to ransack his past life. Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs, no matter what explanation of them he attempts to make, it will be more damaging evidence against him, and conduce more to his conviction, than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this—knows that juries are inclined to act from impulse, and to convict parties accused upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case if they think him a scapegrace or vagabond. That is human nature. The judge might demurely and dignifiedly tell them that they

must disregard the evidence except so far as it tended to impeach the testimony of the party; but what good would that do? And it is not at all improbable but that he himself would imbibe some of the prejudice which proof of the character referred to is liable to engender. Such a practice would necessarily prevent the party accused from ever offering himself as a witness, which would leave the jury to conjecture, and speculate why he pursued such course, and often, very probably, they would draw an unfavorable inference from the circumstance."

This is another case cited approvingly by the U. S. Supreme Court in the case of *Fitzgerald v. United States*, *supra*.

It follows that a prosecuting attorney should not be permitted to comment or draw unfavorable inferences because the defendant has failed to deny or explain matters as to which he properly could not be cross-examined, and, of course, for the same potent reasons, the trial Judge, in his charge to the jury, should not be permitted to comment upon the failure of the defendant to deny or explain matters as to which he could not properly be cross-examined or instruct the jury as did the trial Judge in the case at bar.

The case of *Williams v. United States*, 168 U. S. 509; 42 L. Ed. 509, is also in point. In that case the trial Judge had instructed the jury, among other things, to the following effect:

"Where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary con-

clusion may be considered, although this attitude of the case alone would not be entitled to much weight, because the burden of proof lies on the prosecution to make out the whole case by sufficient evidence; but when proof of inculpat- ing circumstances had been produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and to show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charges. Therefore, if in this case the defendant could have produced testimony explaining his several deposits in the San Francisco Savings Union and the Hibernia bank during the months of September, October, November, and December, 1895, and has failed to produce such testimony, then you are at liberty to infer that any explanation in his power to make would have been, if made, adverse and prejudicial to the defense."

It will be noted that the above instruction is very similar to the objectionable instruction given in the case at bar. The Supreme Court of the United States held such an instruction to be erroneous and reversed the case, with directions to grant a new trial, saying:

"The accused was entitled to stand upon the presumption of his innocence, and it cannot be said from anything in the present record that he was under any obligation arising from the rules of evidence to explain that which did not appear to have any necessary or natural connection with the offense imputed to him. In

our judgment the court, under the circumstances disclosed, erred in not excluding the affidavit and bank books as evidence, *as well as what it said to the jury on that subject.*" (Italics ours.)

The Circuit Court of Appeals for the Sixth Circuit, in the case of McKnight v. United States, 115 Fed. Rep. 972, Circuit Judge (now Mr. Associate Justice) Day, delivering the opinion, entered very fully into the subject of the constitutional right of the defendant not to be compelled to be a witness or to furnish any incriminating evidence against himself, and, in an elaborate discussion, shows how jealous the courts have been to protect a defendant from any illegitimate and unconstitutional practices subversive of this constitutional right and prevent any comment whatever by prosecuting attorney or Judge because of his failure to testify. The opinion is highly interesting upon the subject in general and its rationale directly applicable to the case at bar.

The rule in the State of California is thoroughly well settled that where a defendant takes the stand and testifies, his failure to testify upon any particular point cannot be commented on in the argument by the prosecuting attorney or by the Court in its charge to the jury.

In the case of People v. O'Brien, 66 Cal. 602, it is held that a defendant in a criminal prosecution, who has become a witness in his own behalf, cannot be cross-examined as to any facts or matters not

testified to by him on his examination in chief, and if the trial Court permit a more extensive cross-examination, the right secured to the defendant by section 13, article 1 of the constitution of the State of California, declaring that no person shall "be compelled, in any criminal case, to be a witness against himself", is violated.

In the case of *People v. Sanders*, 114 Cal. 216, 238, one of the leading authorities on the subject in the State of California, the opinion of the Court being delivered by Justice Henshaw, the Supreme Court of this state said:

"We note no other points presented by appellant that seem to call for especial comment, saving the objection of the argument of the district attorney before the jury. A book of blank drafts introduced in evidence was claimed by the prosecution to be in a different condition from that in which it was upon a former trial. Defendant was not interrogated upon the subject of the book. The district attorney in argument commented on this, saying that if it was in the same condition now as it had previously been, the defendant, better than anyone, could have explained and testified to that fact. *Defendant's failure to testify upon any particular point could not be commented on in argument.* (*People v. McGungill*, 41 Cal. 429; *State v. Fairlamb*, 121 Mo. 137.) For the foregoing reasons the judgment and order are reversed and the cause remanded for new trial."

This authority is directly applicable to the repeated flagrant infractions committed by the prosecuting attorneys in the case at bar, in both their opening and closing arguments, in commenting, over

the constant objections of counsel for defendant and without any rebuke or check from the trial Judge, upon defendant's failure to deny or explain certain matters which they considered pregnant with guilt.

In the case of *People v. McGungill*, 41 Cal. 429, it was held that the fact that a defendant offers himself as a witness in his own behalf does not change or modify the rules of practice, with reference to the proper limits of a cross-examination, and does not make him a witness for the state against himself.

It was further held that, in such a case, it is irregular for the counsel for the prosecution, against the objections of the defendant's counsel, to comment, in his argument to the jury, upon the refusal of the defendant to be cross-examined as to the whole case; and for the Court to permit a continuation of such comments, against such objections, is erroneous and prejudicial to the rights of the defendant.

The Supreme Court of California said:

"It appears from the bill of exceptions that 'one Yates was called and sworn as a witness for the prosecution, and, among other things, stated that he had a certain conversation with the prisoner.' This closed the evidence for the prosecution. The defendant was then placed upon the stand as a witness in his own behalf, and was asked if he had the conversation with Yates spoken of by Yates, and answered he did not, and was examined no further by his counsel than concerning said conversation, nor was

he examined on any other point, but answered all questions required of him by the Court; that upon the argument of the case the counsel for the prosecution commented upon the fact before the jury; that the defendant refused to be cross-examined in the whole case; that defendant's counsel protested against said comments, but they were continued by permission of the Court. This conduct of counsel for the prosecution, under sanction of the Court, as against objections of the defendant's counsel, was irregular, and its permission by the Court erroneous, and manifestly prejudicial to the rights of defendant. (*People v. Tyler*, 36 Cal. 522.)

The fact that defendant offered himself as a witness in his own behalf, did not, as to him, change or modify the rules of practice with reference to the proper limits of a cross-examination of a witness; and, clearly, the prosecution could not legally claim that defendant should be made a witness for the State against himself. To attempt such an outrage of defendant's rights, and then, with the sanction of the Court, in argument to the jury, to comment upon the failure of such attempt as the circumstance tending to establish the guilt of defendant, cannot be justified or sanctioned."

For an excellent statement of the general law on this subject, we commend the opinion of Chief Justice Sawyer (afterwards United States Circuit Judge) in the case of *People v. Tyler*, 36 Cal. 522, 527 et seq.

In the case of *State v. Elmer*, 115 Mo. 401, it was held that the right of a prosecuting attorney to comment on the testimony of a defendant who has testified in his own behalf extends no further than does the right to cross-examine such defendant as to

matters testified to by him in his direct examination. The character of the comments made by the prosecuting attorney in the case cited are identical with the obnoxious comments made in the case at bar. In his opening argument, Mr. Roche said, among other things: "I say that they did not dare—I use that word advisedly—that the defendant did not dare to take the stand and contradict the testimony of these girls" (Transcript of Record, p. 418). To which language exception was taken by counsel for defendant. The Supreme Court of Missouri, in considering identical language, said:

"The bill of exceptions shows, however, that the defendant was sworn as a witness in his own behalf and that the prosecuting attorney in his closing remarks to the jury, among other statements, said that: '*Although the defendant was sworn on his own behalf he nowhere denied that he received the money from Minnie Lay. Neither did he deny but what he was guilty.*' That '*his attorney did not dare to ask him these questions while on the stand, and why did they not ask him these questions of importance? Gentlemen, they did not dare to ask them!*' These statements were objected to at the time and the attention of the court called to them and asked to rebuke the attorney making them, but the court did not sustain the objection or pay any attention to it.

Defendant had stated while on the witness stand that on Saturday, the day next preceding the night on which the money is alleged to have been stolen, he had a \$20 bill, two tens, and \$7 or \$8 in money. He was not asked on his direct examination how or where he got it, or whether he was guilty as charged or not. But he did state on his cross-examination that he worked

for it, that he got in a little game or so in Kansas City, Kansas, and that he ran a little game in Albuquerque.” (Italics ours.)

After referring to a number of decisions in the State of Missouri, the Supreme Court continued:

“Governed, then, by the rule announced in these decisions the state would have had no right to cross-examine the defendant as to where and how he got the money, had it been objected to, or whether he was guilty of having stolen it, and if he had not gotten it from Minnie Lay. If then this be the rule as laid down by this court, and we so understand it, the remarks objected to as herein set forth were entirely out of the record, unauthorized by the evidence in the case and prejudicial to the rights of defendant.

Counsel in addressing juries in cases of this character have frequently been admonished by this court of the impropriety of making statements unauthorized by the evidence and facts, and thus inject error for which they have been and must continue to be reversed. We regret the necessity of having to reverse this case, as we are compelled to do under repeated adjudications upon the ground alone of the remarks of the prosecuting attorney in his closing address to the jury. The judgment is reversed and the cause remanded. *All concur.*”

In the case of *State v. Fairlamb*, 121 Mo. 137, 150, the Supreme Court said:

“Much of the closing argument of the counsel for the state in his address to the jury was out of place, and should not have been permitted by the court in any case, much less upon a trial when the life of a human being was at stake. *State v. Ulrich*, 110 Mo. 365; *State v.*

Warford, 106 Mo. 55; State v. Young, 105 Mo. 634; State v. Young, 99 Mo. 666; State v. Jackson, 95 Mo. 623. Counsel in their argument should be confined to the record, the facts in proof and instructions of the court, but may properly draw, by way of argument, any deduction that naturally flows therefrom.

"It was improper to comment on defendant's failure to testify to any particular fact. State v. Graves, 95 Mo. 510; State v. Elmer, 115 Mo. 401; State v. Walker, 98 Mo. 118." (Italics ours.)

Taking up another phase of this argument, it is to be observed that a reading of the trial Judge's charge to the jury, containing the erroneous instructions, to which our assignments of error are addressed (Assignments of Errors Nos. 206, 207) will disclose that the trial Judge appreciated, and in fact so instructed, the jury, that:

"It was the defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked on cross-examination as to matters not covered by his direct testimony." (Transcript of Record, p. 439.)

But, the learned trial Judge immediately nullified this instruction by continuing as follows:

"But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, (as has been stated to you by counsel for the government) to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled

to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but *where a defendant elects to go upon the stand and testify, he then subjects himself to the same rule that applies to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence.*" (Transcript of Record, pp. 439, 440.)

These instructions were, obviously, inconsistent with each other, contradictory, confusing and must have misled the jury. The jury was told, in one breath, that it was the "defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony", and, in the very next breath, the jury was told, if he did avail himself of his privilege, that, "in passing upon the evidence in the case for the purpose of finding the facts, you have a right (as has been stated to you by counsel for the government), to take this *omission of the defendant into consideration*", and further dilated upon and intensified this erroneous instruction by adding:

"But where a defendant elects to go upon the stand and testify, he then subjects himself

to the same rule that applies to any other witness, and if he has failed to deny or explain facts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence." (Transcript of Record, p. 440.)

7 Ency. of U. S. Sup. Ct. Repts., tit. "Instructions", p. 33, sec. 9, and cases cited.

It is plain that the trial Judge told the jury, at the outset, that the defendant was well within his rights in limiting his testimony, but he practically takes that all back when he instructs the jury that it may take this "omission into consideration". He instructs the jury that it is a right of the defendant to limit his testimony, but he immediately follows that up by practically telling the jury that if a defendant avails himself of this right it is *to be considered against him*. We respectfully submit that it is too plain for argument that the trial Judge committed error, in charging the jury as he did.

There is another aspect of the erroneous instructions excepted to and made the basis of these assignments of errors, as well as the rulings of the trial Court, and its comments, during the opening and closing arguments of the prosecuting attorneys, which compels us further to complain about these instructions.

The instructions as given, we respectfully insist, are in direct conflict with and contrary to that portion of the charge to the jury regarding the doctrine of the presumption of innocence and of reasonable doubt.

What was the effect of these instructions? The trial Court said, in effect, that by reason of the fact that the defendant had taken the stand as a witness for himself, that, perforce, the jury could disregard the prior instruction of presumption of innocence. In other words, that the probative effect of the presumption of innocence had lost its efficacy and could be disregarded by the jury in arriving at its verdict. That the burden of proof had shifted and that the moment defendant took the stand it was incumbent upon him to prove himself innocent. Has a trial Judge in a criminal prosecution the right to so instruct? If that is the law, then no defendant in a criminal case could safely take the stand to refute any statement or be sworn for any purpose.

Mr. Justice Harlan, in *Davis v. U. S.*, 160 U. S. 469, on pages 486-7, placing the burden of proof on a plea of insanity in a criminal case, says:

“In a certain sense it may be true that where the defense is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity. But to hold that such presumption must absolutely

control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged."

Upon the point that the presumption of innocence is legal evidence for the jury, Mr. Justice White, in the Coffin case, 156 U. S. 432, at pages 459, 460 and 461, says:

"In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

Greenleaf thus states the doctrine: 'As men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore, evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, *as matter of evidence, to the benefit of which the party is entitled.*' (On Evidence, Part 1, Sec. 34.)

The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy.

Whether thus confining them to 'the proofs' and only to the proofs would have been error if the jury had been instructed that the presumption of innocence was a part of the legal proof, need not be considered, since it is clear that the failure to instruct them in regard to it excluded from their minds a portion of the proof created by law, and which they were bound to consider. 'The proofs and the proofs only' confined them to those matters which were admitted to their consideration by the court, and among these elements of proof the court expressly refused to include the presumption of innocence, to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend him."

That the rule invoked by the trial Court below is the rule in civil cases is well established. But in criminal cases, where the witness failing to disclose is the *defendant himself*, another rule must prevail.

Mr. Justice White in the thoroughly considered case of *Coffin v. U. S.*, 156 U. S. 432, 39 L. Ed. 481, very ably defines and differentiates the doctrines of presumption of innocence and reasonable doubt in criminal cases.

From Mr. Justice White's definition, it will very clearly be seen that the presumption of innocence permeates the whole case and is to be carried through and delivered to the jury as *legal evidence* to be placed in the scales of justice with the evidence adduced upon the trial on behalf of the defendant.

"The principle that there is a presumption of innocence in favor of the accused is the un-

doubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law."

9 Ency. U. S. Sup. Ct. Repts., title "Presumption and Burden of Proof", I, F, 2, p. 623, and cases cited.

The rule is as binding upon the Courts as though expressly contained in the federal constitution. It is fundamental; and, being such, is indispensable to a fair trial in the prosecution of criminals in this country. It is a probative legal fact which *must* go to the jury with all the other evidence and testimony.

"Innocence is presumed in a criminal case until the contrary is proved: or, in other words, reasonable doubt of guilt is in some cases of the kind ground of acquittal, where, if the probative force of the presumption of innocence were excluded, there might be a conviction; but the presumption of innocence as probative evidence is not applicable in civil cases * * *."

Lilienthal's Tobacco v. U. S., 97 U. S. 237.

In the case at bar, the trial Court, after instructing the jury as to the presumption of innocence of the defendant, continued as follows:

"But where a defendant elects to go upon the stand and testify, he then subjects himself to the same rule that applies to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circum-

stances in reaching their conclusion as to his guilt or innocence.” (Transcript of Record, p. 440.)

Therefore, as above stated, we respectfully insist that the above instruction is in direct conflict with and contrary to that portion of the trial Judge’s charge to the jury regarding the doctrines of presumption of innocence and of reasonable doubt.

Furthermore, the instructions were unconstitutional.

The Supreme Court, in *Councilman v. Hitchcock*, 142 U. S. 547, 585, said:

“It is quite clear that legislation cannot abridge a constitutional privilege * * *.”

The same rule applies with equal force to the other branches of our government.

When the Court below instructed the jury to the effect that it could construe defendant’s silence as corroborative evidence of all the material evidence adduced against him, the instruction was in direct conflict with amendment V. It abridged a constitutional privilege. “Nor shall (any person) be compelled in any criminal case to be a witness against himself.” The instruction made the defendant a witness against himself. His silence was legal evidence. As we have shown under another assignment of error, the prosecution could not elicit this evidence by cross-examination of defendant. Neither could the prosecution call the defendant for its witness and compel him to corroborate

its evidence. How then can the Court compel the defendant to so testify? This is the effect of the charge. The Court accomplished for the prosecution what the law and the constitution forbid the prosecution to bring to pass.

“These statutes, (authorizing a defendant in a criminal action to testify in his own behalf), however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance; and if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger.”

Cooley’s Constitutional Limitations, (original paging) 317.

Without multiplying authorities or indulging in further argument on this subject, and keeping always in mind that the prosecuting attorneys did not ask the defendant a single question on cross-examination, we respectfully submit that serious and reversible errors were committed both by the trial Judge and the prosecuting attorneys:

(1) The latter committed flagrant and unpardonable errors in repeatedly and insistently commenting, both in their opening and closing arguments, over the many objections of counsel for defendant and without any rebuke or check from the trial Judge but, on the contrary, with his sanction and approval, upon the failure of the defendant to deny or explain certain matters, which they deemed of an incriminating nature, and as to which the defendant could not properly be cross-examined;

(2) The trial Judge likewise committed serious error in permitting and sanctioning the prosecuting attorneys, both in their opening and closing arguments, and against the repeated objections of counsel for defendant, to comment upon defendant's failure to deny or explain acts which they deemed of an incriminating nature, and as to which he could not properly be cross-examined; even going so far, on several occasions, as to state to counsel in the presence of the jury that he would instruct the jury substantially in accord with the arguments of the prosecuting attorneys;

(3) Finally, the trial Judge committed serious and reversible error in instructing the jury as he did.

IV.

The Court Erred In Its Refusal to Instruct the Jury, As Requested by Counsel for the Defendant: (1) to Determine From All the Evidence and Circumstances in the Case, Under Appropriate Instructions, Whether Marsha Warrington and Lola Norris, or Either of Them, Were Accomplices of the Defendant; and (2) if the Jury Should Arrive at the Conclusion, Under Such Instructions, that Marsha Warrington and Lola Norris, or Either of Them, Were Accomplices of the Defendant to Further Instruct Them That the Testimony of an Accomplice Should be Received With Caution and Weighed and Scrutinized with Great Care by the Jury and the Jury Should Not Regard the Evidence of an Accomplice Unless She Is Confirmed and Corroborated in Some Material Parts of Her Evidence.

The learned trial Judge refused to give any of the instructions requested by counsel for defendant upon the subject of accomplices, basing such refusal upon the ground that he did not consider Marsha Warrington and Lola Norris, or either of them, accomplices of the defendant.

In this view, he was clearly in error. The conviction of the defendant upon the first count of the indictment, if such conviction can be sustained at all, depended entirely upon the testimony of Marsha Warrington and Lola Norris, or of either of them. It is our contention that there is no evidence at all in the record to sustain the conviction, but, assum-

ing, for the sake of argument, that the testimony of Marsha Warrington and Lola Norris, or either of them, was sufficient for any purpose at all in the case, we stoutly maintain that there was evidence tending to show that they were accomplices of the defendant, and the Judge of the Court below should have submitted to the jury, under appropriate instructions, first, the question whether or not they were accomplices, and, second, should have given the cautionary instructions applicable to the testimony of accomplices, which it is the almost universal practice for all Courts, state and federal, to give.

The requested instructions on this subject, which the trial Judge refused to give, to which refusal counsel for defendant took timely exceptions and have embodied said exceptions in proper assignments of error, are as follows:

“The Court erred in refusing to give to the jury instruction Number 32 requested on behalf of defendant, which instruction is in the words and figures following, to wit:

When a crime involves the co-operation of two or more people, the guilt of each will be determined by the nature of that co-operation. Whenever the co-operation of the parties is a corrupt co-operation, these parties co-operating are accomplices, the one with the other, because their conduct is corrupt, and each has mutually aided the other in the commission of a crime to which the corrupt participation of the two is necessary.” (Transcript of Record, pp. 99, 446, 449, 450; Assignment of Error No. 155.)

“The Court erred in refusing to give to the jury instruction No. 33 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are instructed that every person of legal responsibility who voluntarily co-operates with, or aids, or assists, or advises, or encourages another in the commission of a crime, is an accomplice, without regard to the degree of his guilt, and without regard to whether or not they may be indicted as principals. One is an accomplice for what he has done, and not because of the form of punishment which the law may mete out for his acts.” (Transcript of Record, pp. 99, 446, 450; Assignment of Error No. 156.)

“The Court erred in refusing to give to the jury instruction No. 34 requested on behalf of defendant, which instruction is in the words and figures following, to wit:

I instruct you, as to the witness, Lola Norris, if you believe her testimony, that she is an accomplice of the defendant, and, in this connection, I further instruct you that while it is permissible in the federal Courts to convict upon the uncorroborated testimony of an accomplice, still I further instruct you that before convicting the defendant on the uncorroborated testimony of an accomplice, you should view their testimony with great care and caution.” (Transcript of Record, pp. 99, 100, 446, 450; Assignment of Error No. 157.)

“The Court erred in refusing to give to the jury instruction No. 35 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are further instructed that the testimony of accomplices, if you should believe and be satisfied beyond all reasonable doubt and to a moral certainty that Marsha Warrington and

Lola Norris, or either of them, were the accomplices of the defendant, should be received with caution and weighed and scrutinized with great care by the jury, and their evidence should not be accepted or regarded by the jury unless they are confirmed or corroborated in some material parts of their evidence connecting the defendant with the offense charged.” (Transcript of Record, pp. 100, 446, 450, 451; Assignment of Error No. 158.)

“The Court erred in refusing to give to the jury instruction No. 101 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are hereby instructed that the testimony of one accomplice cannot be accepted as sufficient corroboration of the testimony of another accomplice.” (Transcript of Record, pp. 113, 446, 462; Assignment of Error No. 186.)

“The Court erred in refusing to give to the jury instruction No. 102 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are hereby instructed that if you believe the testimony of Marsha Warrington and Lola Norris, or of Marsha Warrington, or of Lola Norris, then they are both accomplices with the defendant, and their testimony should be received with caution and weighed and scrutinized with great care by the jury and you should not regard the evidence of an accomplice unless he is confirmed and corroborated in some material parts of his or her evidence connecting the defendant with the crime by unimpeached testimony.” (Transcript of Record, pp. 114, 446, 463; Assignment of Error No. 187.)

There was testimony introduced during the trial, amply justifying the giving of the requested instructions. The testimony of the defendant Caminetti himself was alone sufficient to require the trial Judge to give the requested instructions. He testified, among other things, as follows:

“Mr. Diggs said: ‘I have just come up from San Francisco and my father is coming up Monday to have you and Lola and Marsha arrested; he claims that you and Lola and Marsha are as much responsible for the position in which I am in as I am, and that he is going to put you three through everything I have gone through.’ He said, ‘I tried to keep him from coming up, but I could not, and he will be up here tomorrow morning.’ That is about the substance of what he said. He went over it and enlarged upon it. I replied, ‘Then, I am gone.’ I meant that when Mr. Diggs got there to have me arrested that I would not be there, that I was going to get out of town. First Mr. Diggs said that if I went it would be necessary for him to go and when he said that Miss Warrington said, ‘I am going too, I can’t stay here if you leave.’ And Lola—Miss Norris said—that she could not go, although she hated to stay in Sacramento and face things she thought or knew were going to happen but she could not leave. *Thereupon Miss Warrington turned around and said ‘Lola, I am going and you have got to go too’.*” (Transcript of Record, p. 407.)

This testimony certainly placed Miss Warrington in the attitude of an accomplice.

It is true that both Marsha Warrington and Lola Norris denied that Miss Warrington had made any

such statement to Miss Norris. Miss Warrington testified, on redirect examination:

“I never advised Miss Norris to take this Reno trip. I told her she could do exactly as she pleased.” (Transcript of Record, p. 278.)

Miss Norris testified as follows:

“Miss Warrington and I talked about it when we were alone several times, and we both had our opinions on the matter, but Miss Warrington never told me that I had to go or asked me to go, or anything of the kind.” (Transcript of Record, p. 300.)

But the truth of this testimony was for the jury to pass upon and determine. It being clearly a question of whom the jury should believe, whether the testimony of the defendant Caminetti or the testimony of the two young women, their credibility was of the greatest importance, not only the credibility of the defendant but the credibility of the two young women. If the testimony of the defendant was true, then certainly Marsha Warrington was an accomplice with the defendant. She became such from the moment that she “turned around and said, ‘Lola, I am going and *you have got to go too.*’” Aside from this poignant piece of evidence, the record is replete with many other acts and statements of Marsha Warrington showing her active complicity.

It was of the greatest importance to the substantial rights of defendant that appropriate instructions should have been submitted to the jury

as to what act or acts or conduct constituted one an accomplice, and, furthermore, that the jury should have been carefully instructed as to what weight should be attached to the testimony of an accomplice, and also it should have been instructed that one accomplice cannot corroborate another accomplice. The learned trial Judge declined to give any instructions whatever on this subject.

A perusal of the testimony in the record, particularly the testimony of Marsha Warrington and of Lola Norris, will disclose the pernicious activity of Marsha Warrington in inducing Lola Norris to accompany them from Sacramento, California, to Reno, Nevada. She was the intimate and almost constant companion of Lola Norris. She was somewhat older than Lola Norris, her age being 22 and that of Lola Norris being 20. She had the highest incentive to leave Sacramento on account of her delicate condition, and naturally wanted her intimate friend, Lola Norris, to accompany her. She participated in almost all of the interviews at which Maury I. Diggs and Lola Norris were present. She took a leading part at the important interview held on Sunday, March 9, 1913, when both she and Lola Norris decisively made up their minds to leave Sacramento. At this all-important meeting Maury I. Diggs was present with Marsha Warrington and Lola Norris, but it is a most significant fact that the defendant Caminetti was absent from that meeting. It was Marsha Warrington who took a suit case with her containing articles

of wearing apparel and for female toilet use. Miss Norris took nothing with her or comparatively little. Miss Norris testified:

“I took some handkerchiefs in preparing to go to Reno. *Miss Warrington took quite a number of articles.* I was present when she was packing her valise. I did not help her pack her valise. She was packing her valise in her own house. Her father and mother were out some place during the time she was packing her valise. They were out when we got to her house. At that time, when Miss Warrington was packing her valise, it was not our intention to go to Reno. It was our intention to go some place; we told Mr. Diggs we would go. But not to Reno, just simply to get out of town. We had decided to go, yes, sir. At the time when I was present at Miss Warrington’s house when she was packing her valise, neither Mr. Diggs or Mr. Caminetti were there. Just we two were there alone. At that time we did not discuss ourselves as to whether we would go out of town or whether it was best to go out of town. We discussed all of that before. I was frightened. She was frightened, I think so, yes sir. I did not say at that time to her, or she to me, if all of these things are going to come out we had better skip and get out of town. We said all that before. I did not take any baggage along because Mr. Diggs told us not to take any. *I know Miss Warrington took baggage along, but I didn’t want my mother and father to see me leaving the house with a valise. We were in fact leaving home surreptitiously. It is the fact I did not want my father and mother to see me with any baggage.* Then we went down to the Saddle Rock Restaurant. Miss Warrington and I together. We took a street car. In the meantime Miss War-

rington left her suit case in the drug store. I don't know if she said anything to the man in charge as to why she left it; I did not go in with her. *She did not want to bring the valise to my house.* I went from her house to my house. I wanted to tell my folks good bye. I told them I was going that night to spend the evening with a friend—that is all. We talked for about half an hour on the porch. I said who the friend was. It was a friend of Miss Warrington's and mine. It was a lady friend. I told my father and mother where I was going. I volunteered it. I did not cry at the house when I said good bye. I cried after I left the house. I did not say I was going to stay there over night. I said I was going to stop at Miss Warringtons' over night. Prior to that time I had been out nights at Miss Warrington's house. Not very often during the six months preceding this trip to Reno. Miss Warrington has been to my house at nights. Several times, three or four." (Transcript of Record, pp. 323, 324.)

Miss Warrington testified:

"The next time I met Mr. Diggs, after this Saturday afternoon at the Peerless, was the next afternoon. I met him at the Plaza, at 28th and 'J'. *At that time Mr. Caminetti was not present. Just myself and Miss Norris and Mr. Diggs.* In the meantime, myself and Miss Norris had decided not to go. I am positive I had made up my mind I would not leave the City of Sacramento, absolutely under no circumstances. And it was at this conversation with Mr. Diggs, *at which time Mr. Caminetti was not present, that we again made up our minds to go.* That was Sunday afternoon. We were out there two hours I think. And *we discussed all the unfortunate conditions which sur-*

rounded Miss Norris and myself at that time. Miss Norris also decided to go then and there. Then we went to our homes. I went to my home and got a grip. I put in some clothes for myself and then went to Miss Norris' house. Miss Norris at that time was very much worried and excited, we were both very much worried. When I went to my home to get my few articles of clothing, I saw members of my family. I talked with them. I did not tell them that I was going away. Up to that time they had no knowledge of my condition. I said I was going out to spend the evening. Then I went to Miss Norris'. I went with her to her house. I saw some of her family. I did not say anything to any of them about where we were going. She in my presence did not say anything to her family. I was with her all the time. I did not tell her mother that we were going out to stay with some friends. We said we were going out to spend the evening. I did not take my suitcase or my grip in the presence of Mrs. Norris. We left it at the drug store. I did not say that Miss Norris took any bag. I think she had a skirt and a waist underneath her dress, or something like that. I took my grip to the drug store before going to Mrs. Norris' house. I did that in order that Mrs. Norris' or her family would not see it. We had not seen Mr. Caminetti at all that day.' (Transcript of Record, pp. 264, 265.)

A mere reading of these excerpts from the testimony of Miss Norris and Miss Warrington, aside from the direct and positive testimony of the defendant that Miss Warrington insisted upon Miss Norris accompanying her, discloses the pernicious activity of Miss Warrington in inducing, and aiding and assisting, Miss Norris to accompany her

on the trip from Sacramento, California, to Reno, Nevada.

Furthermore, the testimony of these two young women discloses beyond question that Lola Norris was not an innocent "victim" of any act of the defendant conducing to her transportation; on the contrary, the evidence shows that she went willingly and of her own free will and with the single purpose, at the time of her departure from Sacramento and until *after she had passed the state boundary line between California and Nevada*, to escape impending notoriety, scandal and disgrace as the result of her indiscreetness in keeping company with the defendant Caminetti and in associating with Marsha Warrington and Maury I. Diggs. If there was any other purpose in her departure, that purpose was not formed, as will appear in a succeeding portion of this brief, until after the defendant Caminetti and Lola Norris had passed the *boundary line dividing the states of California and Nevada*. In other words, the purpose in leaving Sacramento was not, as is alleged in the first count of the indictment (upon which count alone the defendant was convicted) "that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant", but the purpose was a different one, entirely disassociated from any object of concubinage.

Lola Norris was not a "victim". She was a willing accomplice, and so was Marsha Warrington. They both "knowingly and voluntarily, and with

common intent with the principal offender, united in the commission of an offense", assuming, for the sake of argument only, that any offense at all was committed by the defendant Caminetti.

The above often cited quotation is taken from the opinion of Judge Maxey in *United States v. Ybanez*, 53 Fed. Rep. 536, 540, where the learned Judge used the following language, so apposite to the case at bar:

"An accomplice 'is a person who knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of an offense'.

It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the government has the right to use him as a witness. It is the duty of the court to admit his testimony, and that of the jury to consider it. The testimony of an accomplice is, however, *always to be received with caution, and weighed and scrutinized with great care by the jury*; and it is usual for the courts to instruct juries—and you are so instructed in this case—not to regard the evidence of an accomplice *unless he is confirmed and corroborated in some material parts of his evidence connecting the defendant with the crime, by unimpeachable testimony.*" (Italics ours.)

Some of the requested instructions, which were refused, were, almost word for word, taken from the language of Judge Maxey in the case above cited. (See Transcript of Record, pp. 114, 100; Assignments of Error 158, 187.)

There was ample evidence, as disclosed by the Transcript of Record, which required the trial Judge to submit to the jury, under appropriate instructions as requested on behalf of the defendant, the question, first, whether Marsha Warrington and Lola Norris, or either of them, were accomplices of the defendant; and then, second, if the jury should so find, the cautionary instructions should have been given advising the jury of the weight it should accord to the testimony of an accomplice; and, third, that an accomplice cannot be corroborated by the testimony of another accomplice.

The evidence contained in the Transcript of Record discloses that Lola Norris and Marsha Warrington were willing accomplices with the defendant. They were not coerced. They were not unwilling or innocent victims. The jury acquitted the defendant upon both counts in the indictment in which he was accused of having persuaded or induced or enticed either Lola Norris or Marsha Warrington to leave Sacramento and go to Reno. Aside from this verdict of the jury eliminating from the case any question of persuasion or inducement or enticement on the part of the defendant, a reading of the evidence in the record shows that both Lola Norris and Marsha Warrington were willing accomplices. They come clearly within the definition of what constitutes an accomplice, as laid down by Judge Maxey in *U. S. v. Ybanez*, *supra*.

Furthermore, it is the well settled rule that one of the participants in the act of fornication, or

adultery, or in the act of incest, if the participation *is voluntary and with guilty knowledge*, is an accomplice.

Cyc., vol. 12, pp. 447, 448, and cases there cited.

In the leading case, in California, of *People v. Coffey*, 161 Cal. 433, 447, it was said:

“In adultery and fornication, where the willing consent of the woman is proven or assumed, the courts have found no difficulty in declaring her to be an accomplice with the man. For there, differing from abortion, no considerations of the temptation of the woman’s hard lot operate to soften the court’s views. They are accomplices the one with the other because their conduct is corrupt and each has mutually aided the other in the commission of a crime to which the corrupt participation of the two is necessary. (Citing *State v. Scott*, 28 Or. 331, 42 Pac. 1; *Merritt v. State*, 12 Tex. App. 203; *Townser v. State*, 58 Tex. Crim. 453, 137 Am. St. Rep. 976, 126 S. W. 572.)”

Aside from this, the view entertained by the Supreme Court of the United States, and announced in the case of *Bennett v. United States*, 227 U. S. p. 333, one of the leading “white-slave cases” recently decided by the Supreme Court, is in accord with our contention.

It was complained, in that case, that the trial Court had “erred in its instructions to the jury in regard to the extent of the corroboration Opal Clarke’s testimony had received”.

We quote from the opinion of the Supreme Court:

“(1) Defendant was indicted for having caused the transportation of *Opal Clarke*.”

* * *

(5) The basis of this contention is that Opal Clarke was the accomplice of defendant as to Ella Parks, and that hence the Court erred in its instructions to the jury in regard to the extent of corroboration Opal Clark's testimony had received.

The instruction complained of submitted to the jury the fact, and warned against a conviction upon the uncorroborated testimony of an accomplice, and said: ‘Necessarily, if you find that she was an accomplice with respect to these charges or any of them, you will then necessarily have to inquire into the facts as to whether or not there is corroborating testimony. There is evidence tending to corroborate her testimony, and it is for you to consider its force and value and the weight to give to it.’ The contention is that this was error, ‘as the Court instructed the jury that there *was* corroborating evidence, when the Court should have charged the jury that it was for them to ascertain from the testimony whether or not there was corroborating testimony’. The objection is hypercritical. The Court did not instruct the jury that there was corroborating testimony, but testimony of that tendency; and added that the force and weight of its corroborating power was for the jury to determine.”

It would seem from the opinion in the above case that there were two girls involved in that transportation, one Opal Clarke and another Ella Parks; just as in the case at bar there are two involved, Marsha Warrington and Lola Norris. We contend that Marsha Warrington was undoubtedly an ac-

complice as to Lola Norris. As the testimony discloses, the defendant testified that she told Lola Norris: "Lola, I am going and you have got to go too." (Transcript of Record, p. 407.) We further contend that inasmuch as whatever Lola Norris did was purely voluntary on her part, she also was an accomplice. The facts in the case at bar bring it squarely within the facts involved in the case of *Bennett v. United States*, upon the proposition of accomplices.

The common law rule, which prevails in the federal Courts, is that a defendant may be convicted upon the uncorroborated testimony of an accomplice. But the practice of the Courts, where such doctrine obtains, is to warn the jury of the danger of convicting unless the accomplice be strongly corroborated. The general rule is well stated in *Greenleaf on Evidence* (6th ed.), vol. 1, p. 493, as follows:

"Sec. 380. The degree of credit which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence, and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But, there is no such rule of law, it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally

the practice to give them such advice, that its omission would be regarded as an *omission of duty* upon the part of the judge."

No common law rule forbids a conviction upon the uncorroborated testimony of an accomplice, if his evidence satisfies the jury of the guilt of the accused beyond a reasonable doubt. Hence, although the uncorroborated testimony of an accomplice should be received and considered by the jury with caution, and the Court *should* and *usually does* instruct them to that effect, they may, in the absence of a statutory provision to the contrary, convict upon the evidence of an accomplice alone, although uncorroborated.

Cyc., vol. 12, p. 453;

United States v. Ybanez, 53 Fed. Rep. 536;

United States v. Flemming, 18 Fed. Rep. 907;

United States v. Harries, 26 Fed. Cas. No. 15309, 2 Bond. R. 311;

United States v. Smith, 27 Fed. Cas. No. 16322, 2 Bond. R. 323;

United States v. McKee, 26 Fed. Cas. No. 15685, 3 Dill. R. 546;

United States v. Lancaster, 26 Fed. Cas. No. 15556, 2 McLean R. 431;

United States v. Reeves, 38 Fed. Rep. 404;

United States v. Van Leuven, 65 Fed. Rep. 78;

United States v. Sykes, 58 Fed. Rep. 1004;

United States v. Kessler, Bald. R. 22;

United States v. Sacia, 2 Fed. Rep. 708;

People v. Bonney, 98 Cal. 278;

People v. Coffey, 161 Cal. 433.

See, also sec. 1111, Penal Code Cal.

The trial Court not only declined to instruct the jury in the language requested by counsel for defendant, but failed to give any instructions at all to the jury advising them to be cautious in convicting upon such testimony, and as to what weight should be accorded such evidence.

Although an accomplice is a competent witness for the prosecution, his testimony should be received with *great care and caution*.

United States v. Smith, Fed. Cas. No. 16322;

United States v. Babcock, Fed. Cas. No. 14487;

United States v. Goldberg, Fed. Cas. No. 15223;

United States v. McKee, Fed. Cas. No. 15686.

Except in one state, it seems to be the well established and almost universal practice for the Court to instruct that the testimony of an accomplice should be viewed by the jury with *great care and caution*.

See cases cited in Blashfield on Inst. to Juries, p. 485.

And a refusal to so instruct is ground for reversal.

Solander v. People, 2 Colo. 48;

Cheatham v. State, 67 Miss. 335;

People v. Sternberg, 111 Cal. 11;
 People v. Strybe, 36 Pac. Rep. 3;
 People v. Bonney, 98 Cal. 278;
 People v. Coffey, 161 Cal. 433.

A conviction founded on the uncorroborated testimony of an accomplice is legal, although it is *almost universal practice, sanctioned by long usage and deliberate judicial approval*, to instruct juries to be *cautious* in convicting upon such testimony.

United States v. Neverson, 1 Mackey, 152;
 United States v. Bicksler, 1 Mackey, 341;
 State v. Hyer, 39 N. J. Law;
 State v. Honey, 19 N. C. 390;
 State v. Miller, 97 N. C. 484.

In United States v. Sykes, 58 Fed. Rep. 1000, 1004, Judge Dick, in charging the jury, said:

“The degree of credit which ought to be given to the testimony of an accomplice is a matter *exclusively within the province of the jury*, and they may believe and act upon such evidence without any confirmation of his statements. But it is the *duty* of the judge to advise the jury to consider such testimony with *great caution*, and not to regard it as worthy of credit *without* corroboration by other evidence material to the issues before them. In doing so, the judge does not withdraw the case from the jury by positive direction, but only advises them not to give credit to such unsupported testimony.”

In Hanley et al. v. United States, 123 Fed. Rep. 849, it was held that a defendant in a criminal case in the federal Courts cannot complain because the

testimony of an accomplice was submitted to the jury, *under instructions that it should be received with caution and carefully scrutinized.*

There is a total want of such instructions in the case at bar.

In *United States v. Van Leuven*, 65 Fed. Rep. 78, 81, District Judge Shiras said:

“At the common law, as the same existed in England, in the progress and development of that law the conclusion was reached by the judges charged with the duty of presiding over trials of criminal cases that it was unwise for a jury to convict a person upon the uncorroborated testimony of an accomplice, and therefore judges cautioned the juries in this particular, and charged them that it was unwise for the jury to convict upon the uncorroborated testimony of an accomplice. In the state of Iowa it has been enacted as a provision of statutory law that no person shall be convicted of a crime upon the uncorroborated testimony of an accomplice, but there must be corroborative testimony tending to connect the defendant with the commission of the crime. *I have always deemed it my duty as a judge of a court of the United States, and trying cases arising in the state of Iowa, and where the defendant is a citizen of this state, to say to the jury THAT THEY CANNOT CONVICT UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.*” (Italics ours.)

The defendant in the case at bar is a citizen of the State of California, and there is a statute in the State of California similar to that enacted in the State of Iowa.

See section 1111 of the Penal Code of California.

We respectfully submit that the remarks and the course invariably pursued by District Judge Shiras are peculiarly applicable to, and should have been followed in, this case by the trial Court.

There is a statute in Texas similar to section 1111 of the Penal Code of California, and in the case of *Martin v. State*, 36 S. W. 587, the Court of Criminal Appeals of Texas, in reversing a case for the failure of the trial Court to charge that a conviction cannot be had on the uncorroborated testimony of accomplices, said, after quoting the statute of that state as to accomplices:

“By a long line of decisions, it has been held that, where the state in a criminal prosecution introduces evidence of accomplices, it is incumbent on the court to give in charge to the jury the above article, and then, in all proper cases, to define who are accomplices, or what it takes to constitute persons accomplices in the commission of crime. *This charge should be given, whether asked or not*; but it is especially incumbent on the court, when the matter is pointed out by a bill of exceptions, to give the law on accomplice’s testimony in charge to the jury. (Citing many cases.) It is not necessary to discuss the testimony of said witnesses. The evidence not only tends to show that said three witnesses were accomplices, and that their testimony was materially prejudicial to the defendant, but the record establishes that the State’s case is mainly based on their evidence; *and why the learned judge should have omitted, in a case of this importance, to give to the jury a charge on accomplice’s testimony, especially when an exception was taken to his charge in this regard, is to us inexplicable.*” (Italics ours.)

Applying the case of *Martin v. State* to the case at bar, and under the rule laid down by District Judge Shiras in *United States v. Van Leuven*, *supra*, it is submitted that the trial Judge was in error in taking the view that Marsha Warrington and Lola Norris, or either of them, were not accomplices and in refusing to instruct the jury as requested by the defendant.

While, technically, the learned Judge of the trial Court may have been correct in refusing to give instructions in the precise language requested by counsel for defendant, nevertheless, the duty rested upon him to give to the jury some appropriate instructions, telling them (to use the language of Judge Maxey) that the testimony of an accomplice is "always to be received with caution, and weighed and scrutinized with great care by the jury".

The jury was left in total ignorance as to whether, in the first place, the witnesses Marsha Warrington and Lola Norris, or either of them, should be considered accomplices of the defendant, under the evidence adduced; and, in the second place, if the jury should consider them under the evidence and instructions of the Court as accomplices, as to what weight should be accorded to the testimony of an accomplice; and, in the third place, if the jury should consider them both under the evidence and instructions of the Court, as accomplices, it should have been further instructed that: "The testimony

of one accomplice cannot be accepted as sufficient corroboration of the testimony of another.”

Cyc., vol. 12, pp. 458, 549, and cases there cited.

People v. Coffey, 161 Cal. 433.

(Transcript of Record, pp. 113, 446, 462; Assignment of Error No. 186.)

In all of these respects, it is respectfully submitted that the trial Judge was in error and that a reversal of the judgment of conviction must follow and a new trial ordered.

V.

The Court Erred In Refusing to Instruct the Jury to Acquit, and In Refusing to Grant the Motion In Arrest of Judgment, Upon the Ground that There Was No Evidence Sufficient to Justify Submitting the Case to the Jury or to Sustain the Judgment of Conviction.

(Transcript of Record, pp. 412, 45, 48; Assignments of Error Nos. 2, 17.)

The motion to instruct the jury to acquit, followed up, as it was, by a motion in arrest of judgment upon the same ground, was predicated upon the fact that there was no evidence sufficient to justify submitting the case to the jury or to support the judgment of conviction on the first count of the indictment, the only count upon which the defendant was convicted.

Furthermore, the evidence shows that the immoral purpose, if any was formed at all, was *not formed* in the State of *California*, but *was formed* in the State of *Nevada* after the defendant and Loia Norris had *crossed* the boundary line dividing the two states.

Each of these points will be taken up in their order.

Not only did the trial Judge refuse to instruct the jury to acquit, but he took special pains in his charge to the jury, to impress upon them that the evidence adduced was sufficient to make out a case

against the defendant *on all four counts of the indictment*, in the following language:

“As I have indicated to counsel *in passing upon the defendant’s motion to instruct the jury to acquit*, the evidence introduced before you by the Government, if believed by you, *is sufficient in its legal aspects, that is, in law, to make a case against the defendant under each one of these counts.*” (Transcript of Record, pp. 438, 439.)

The defendant Caminetti was convicted, as heretofore stated, upon the first count of the indictment, which charged him with having (1) transported, and (2) caused to be transported, and (3) aided and assisted in transporting, Lola Norris in interstate commerce, etc., etc.

There is no evidence that he transported, or caused to be transported, or aided or assisted in transporting Lola Norris in interstate commerce. It must be distinctly remembered that the defendant was not charged with a conspiracy to violate the “White-slave traffic Act”, but he was charged with the doing of a *specific act* with a *specific purpose*. (Transcript of Record, pp. 217, 252-253.) We submit that it is not sufficient for the prosecution to show a mere knowledge that some one else committed a violation of law without also proving some participation by the defendant himself in the commission of the alleged violation of law. Much of the evidence that was admitted by the trial Judge in the case at bar related entirely to the actions of Maury I. Diggs and seemed to be admitted by the trial

Judge upon the theory that if the prosecution could show some sort of confederacy, akin to a prosecution for conspiracy, between the defendant Caminetti and Maury I. Diggs, the acts of the latter could be fastened upon the defendant Caminetti. For instance, the witness Marsha Warrington was permitted to testify that she had had sexual intercourse with Maury I. Diggs. (Transcript of Record, pp. 252, 253.) There is not the slightest pretense in the testimony that defendant Caminetti had ever had any sexual relations with Marsha Warrington, or that he had had anything to do whatsoever with the sexual relations existing between Diggs and Marsha Warrington. He was acquitted of having had anything to do with the transportation of Marsha Warrington or of having induced, persuaded or enticed either Marsha Warrington or Lola Norris to leave Sacramento for Reno. The admission of such testimony, relating to acts and conversations had between Maury I. Diggs and Marsha Warrington, at which the defendant Caminetti was not present and with which he had nothing to do, went far afield and way beyond the issues of the case, and was entirely outside of the charges made against the defendant Caminetti. The admission of such evidence undoubtedly was error. The testimony was admitted by the trial Judge upon the theory that the prosecution involved, in effect, a conspiracy or confederacy between the defendant Caminetti and Maury I. Diggs and Lola Norris and Marsha Warrington to commit a violation of law. This is evi-

dent from the rulings of the trial Judge in admitting such testimony, and we beg to refer to the record. For example, Miss Warrington was allowed to testify as follows:

“At the time I left Sacramento for Reno I was pregnant, by Mr. Diggs.” (Transcript of Record, p. 252.)

There is not the slightest pretense that the defendant Caminetti had anything to do with Marsha Warrington's pregnancy. The admission of such testimony could have had no effect other than to prejudice defendant Caminetti in the eyes of the jury, and discloses to what unwarranted lengths the trial Judge went in admitting testimony.

The record further shows:

“Q. Was Mr. Diggs the only man you had ever had intercourse with in your life? A. Yes——

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. Oh, I think it is a circumstance.

Mr. HOWE. We note an exception.

The COURT. She has answered the question.

Mr. ROCHE. Q. Where did that first act of intercourse take place? A. In his office.

Q. Just state the circumstances under which that first act of intercourse took place?

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. *I don't see that that is material.*

Mr. ROCHE. Very well; I won't press it. I would like to ask just one question, though, with reference to that matter. Q. At the time that this first act of intercourse took place between yourself and Mr. Diggs in his office, or

rather, before that time, and upon that occasion, had you been furnished with any champagne? A. Yes——

Mr. HOWE. One moment. That is objected to as immaterial, irrelevant and incompetent.

The COURT. Yes. I think so. *Well, I don't know about that. I will let the answer stand. The evidence of the Government tends to show that it was a transaction that really was united in by these four different people—that is, I mean the history of the transaction out of which the offense is charged, and I am inclined to think that in such an instance, very similarly to the rules showing a conspiracy, that you may show all the circumstances.* Proceed.

Mr. HOWE. We note an exception.

Mr. Caminetti was in the office at the time *although not in the same room.* Miss Norris was also in the office at the time *although not in the same room.*” (Transcript of Record, pp. 252-253.)

Such testimony was totally foreign to any accusation made by the indictment against the defendant Caminetti. According to the testimony of Marsha Warrington herself, the defendant Caminetti was *not informed by her* and was *not aware* of the fact that this first act of intercourse had taken place between Diggs and Marsha Warrington upon the occasion testified to by Marsha Warrington. She testifies:

“At the time I had my first sexual intercourse with Mr. Diggs at his office, myself and Mr. Diggs were in the room *by ourselves.* Mr. Caminetti and Miss Norris were in *another room.* I did not come out and tell Mr. Caminetti what had happened. I never told him that anything had happened.” (Transcript of Record, p. 280.)

Upon another occasion, the trial Judge again likened the prosecution to one for conspiracy, saying:

“The COURT. The objection is overruled. The evidence tends to show, Mr. Woodworth, that this was a transaction in which four people were engaged, the defendant and another man and these two girls; of course, under such circumstances the declaration of any one of them made in the presence of the other may be permitted to go before the jury, all the circumstances being shown, and the jury will determine whether or not what was said affects the others by ascertaining whether any denial of the declaration was made, and the other circumstances which would tend to show whether the declaration of the one was intended to imply an understanding of the others as to what the transaction involved. *In such a case it is very much like a prosecution for conspiracy*, only here, of course, it is admitted simply because and only because it is made in the presence of the defendant—made either by or in the presence of a defendant. The law is that you may give such declaration in evidence and then if it appears that the defendant remains silent, or that he acquiesced, it will be taken as evidence tending to connect him with the transaction; it is not conclusive at all, but it all goes to the jury for their consideration.

Mr. WOODWORTH. *The point we make is that the defendant is indicted here simply for having violated the White-slave traffic Act. He is not indicted for conspiracy.*

The COURT. Mr. Woodworth, I understand the situation thoroughly and I have ruled. I never permit a discussion after I have ruled. I cannot do it because it takes too much time.

Mr. WOODWORTH. We take an exception to the ruling and to the reasons stated by the Court.” (Transcript of Record, p. 217.)

The above are but two of several instances where the trial Judge admitted evidence of the acts of persons other than the defendant Caminetti upon the theory that the trial of the charges in the indictment, in effect, involved the defendant Caminetti in a conspiracy with Maury I. Diggs, Marsha Warrington and Lola Norris.

As above stated, we challenge the learned prosecuting attorneys to cite, in their reply brief, a single act done by the defendant Caminetti by which he (1) transported, or (2) caused to be transported, or (3) aided or assisted in transporting, in interstate commerce, Lola Norris, etc.

What did he do? What is the act committed by the defendant Caminetti which constitutes a violation of the first count of the indictment? He did not buy the ticket for Lola Norris. Maury I. Diggs did that. He did not request Maury I. Diggs to buy a ticket. He did not furnish Maury I. Diggs with any money with which the latter bought a ticket for Lola Norris. It does not appear that he even carried the dress suitcase that Marsha Warrington had taken with her. He did not buy the Pullman tickets. Diggs did that. In the expressive language of Marsha Warrington, in her direct examination, "Mr. Caminetti *just stood there* with us." (Transcript of Record, p. 249.) Again, on cross-examination, she testified: "Whatever Mr. Caminetti did was merely a silent agreement to everything." (Transcript of Record, p. 263.) And again, she stated: "During the time that Mr. Cami-

netti was there Mr. Diggs did most of the talking, he proclaimed himself boss at that time. *Mr. Caminetti agreed to everything. He agreed to it in a tacit way, I suppose so.*" (Transcript of Record, p. 265.) He accompanied Lola Norris, Marsha Warrington and Maury I. Diggs on the trip from Sacramento to Reno, but merely being present and accompanying these people did not constitute an act of transportation, or cause the transportation, or aid or assist in the transportation. He was no more an active participant than were Marsha Warrington and Lola Norris. He did no more than they did.

It is true that, at the outset, he gave Lola Norris \$20 with which to buy her ticket, but she *never made use of the money for that purpose* and the money was *afterwards returned*, or the greater portion thereof, to the defendant Caminetti by Miss Norris. Miss Warrington testified:

"After Reno was agreed upon at first Mr. Caminetti gave Miss Norris \$20. And he said for her to get the ticket, for herself and me, and Mr. Diggs said, 'No', he thought that he should be boss of the four and he thought that he had better get the tickets. Miss Norris kept the money. Mr. Caminetti said 'All right, you can be boss.' That was said to Mr. Diggs. The way I UNDERSTOOD it *Mr. Diggs was to spend his money and then when he ran short then Mr. Caminetti was to spend his money.*" (Transcript of Record, pp. 248, 266, 267.)

There is no evidence that Diggs ran short of funds and until he did, there was ever present the

opportunity for repentance on the part of the defendant, the *locus poenitentiae*. Non constat, when Diggs ran short of funds, the defendant might have changed his mind and refused to "spend his money."

Miss Norris testified:

"Mr. Caminetti gave me \$20 to buy my ticket. I don't remember anything he said as to what place we were to go to; we might have made a few remarks, but I don't remember just what they were. * * * When we agreed on Reno, just before Mr. Caminetti left he gave me \$20. I don't know whether he wanted me to buy mine or to buy mine and Miss Warrington's together. Immediately after that *Mr. Diggs said that he would buy the tickets.*" (Transcript of Record, p. 303.)

Later on, she testified that she returned the \$20 to Caminetti, as follows:

"I gave the \$20 back to Mr. Caminetti and then he later gave me \$15 back." (Transcript of Record, p. 309.)

There is not the slightest pretense that any part of this \$15 was ever spent by Lola Norris for any transportation.

The evidence affirmatively shows that at the meeting held on Sunday afternoon (March 9th, 1913), at the Plaza in Sacramento, when Miss Norris and Miss Warrington *definitely* made up their minds to leave Sacramento, the defendant Caminetti was *not there at all*, those present being Maury I. Diggs, Marsha Warrington and Lola Norris. (Transcript

of Record, pp. 264, 301.) It, therefore, cannot be claimed that he counselled or advised them to go. Previous to that occasion, they had determined not to leave Sacramento.

At the conversation held between Maury I. Diggs and Marsha Warrington on the levee, at which Miss Warrington's delicate condition was discussed by Diggs and herself and the subject of going away to relieve her unfortunate condition was first broached, the defendant Caminetti was *not there at all*. (Transcript of Record, pp. 261, 262.)

In view of the very meagre evidence in the case, by which the prosecution strove to connect the defendant Caminetti with some act which might bring him within at least one of the provisions of the "White-slave traffic Act" upon which he was indicted, the trial Judge deemed it proper to instruct the jury as follows:

"As to the question, which has been argued by counsel, whether the evidence is sufficient to show that the defendant transported or aided or assisted in transporting these girls to Reno, you will understand that it is not necessary to sustain this charge that the defendant be shown to have himself paid for the tickets or other expenses of that trip. If he contributed to the means for paying such expenses, *or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs*, this would be sufficient upon which to sustain the charge that the defendant aided and assisted in such transportation." (Transcript of Record, pp. 128, 441, 445; Assignment of Error No. 208.)

We respectfully submit that, even as to this far-fetched feature of the case, there was no sufficient evidence in law to justify any such view of the acts of defendant Caminetti or the instruction of the trial Judge to the jury above set out.

Marsha Warrington testified:

“The way *I understood it* Mr. Diggs was to spend his money and then when he ran short then Mr. Caminetti was to spend his money.” (Transcript of Record, p. 248.)

We have already observed that by the time Diggs spent his money there was ever present the opportunity for defendant Caminetti to repent—the *locus poenitentiae*.

“If one who has counseled or commanded the commission of a crime, or agreed to take part in it, repents and withdraws, to the knowledge of the other party, before the crime is committed, he will not be liable as an accessory.”

Cyc. Vol. 12, p. 192;

Pinkard v. State, 30 Ga. 757.

Lola Norris testified:

“Mr. Caminetti and Mr. Diggs were to share the expenses.” (Transcript of Record, p. 303.)

Miss Norris was, palpably, testifying to her conclusion that Caminetti and Diggs *were* to share the expenses, just as Miss Warrington was testifying to: “The way *I understood it*.” Neither of them pretended to testify what conversation was had between Diggs and Caminetti on this subject. The

record shows that no understanding of any reimbursement whatever by Caminetti to Diggs was ever had.

This is absolutely *all* of the evidence in the case as to what took place at Sacramento at the time of any violation of the "White-slave traffic Act", as alleged in the first count of the indictment (under which the defendant Caminetti was convicted), with reference to any reimbursement for any railroad fares or transportation by the defendant Caminetti to Diggs.

But, even this, on examination, will be found to be no legal evidence at all to uphold the verdict on the first count of the indictment. Marsha Warrington testifies: "*The way I understood it*", etc. Obviously, her *understanding* could not constitute legal evidence against the defendant Caminetti; and, furthermore, being herself an accomplice, she could not be corroborated by another accomplice, to wit, Lola Norris. The latter testifies that, "Mr. Caminetti and Mr. Diggs *were* to share the expenses". But she being likewise an accomplice, corroboration of her testimony by that of Marsha Warrington was of no avail, and, standing uncorroborated, was of no value as evidence to support a judgment of conviction.

We have shown, in a previous portion of this Opening Brief (see pages 147-169), that Marsha Warrington and Lola Norris were the accomplices

of the defendant, and being accomplices, it is well settled that:

“The testimony of one accomplice cannot be accepted as sufficient corroboration of the testimony of another.”

Cyc., Vol. 12, pp. 458, 459, and cases there cited.

Outside of the testimony, just referred to, of Marsha Warrington and Lola Norris, which, as we have pointed out, is valueless as legal evidence, there is not a scintilla of evidence that Diggs and Caminetti ever did share the expenses involved in the purchase of the railway ticket or of the Pullman ticket, upon which Lola Norris travelled. There is not a shred of competent or legal evidence in the record, justifying the instruction of the trial Judge to the jury that there was the slightest understanding between Diggs and the defendant Caminetti that the defendant was thereafter to contribute to the purchase of the railway ticket by reimbursing Diggs. There was not the slightest evidence of any agreement or understanding between Diggs and defendant Caminetti that the former was advancing the money to pay for the ticket upon which Lola Norris traveled or that defendant Caminetti should ever pay him back. The evidence clearly shows that the purchase of the railway and Pullman tickets by Diggs was an act purely voluntary on his part and was done by him gratuitously and upon his own responsibility, financially and otherwise, and not at the slightest

solicitation or suggestion of the defendant Caminetti, and without the slightest understanding or intimation that the defendant Caminetti was ever to repay him for his purchase of the railway ticket for Lola Norris. It must be quite evident, from a reading of the record in the case at bar, that there was not sufficient evidence to justify the instruction to the jury above referred to, nor to uphold the judgment of conviction on the first count.

Again, at the risk of repetition, we urge that the defendant was not on trial for a conspiracy with Diggs or anyone else to violate the "White-slave traffic Act". He was on trial for the doing of a *specific act* with a *specific purpose*, and the evidence, to support the verdict of guilty on the first count of the indictment, must show beyond all reasonable doubt that he committed some act, that he did something of a substantial, tangible character. Mere hyperboles of expression by prosecuting attorneys, mere rulings of a trial Judge, are not evidence. The defendant must have himself committed some act and he cannot be convicted because someone else committed the unlawful act charged against him but in which he did not participate.

We respectfully submit that there is no sufficient evidence of anything criminal done by the defendant Caminetti to support the judgment of conviction that he transported, or caused to be trans-

ported, or aided or assisted in transporting, in interstate commerce, Lola Norris, for any immoral purpose whatever.

We now advert, briefly, to the second point urged by us in this connection, which is that the evidence shows that the immoral purpose, if any was formed at all, was not formed in the State and Northern District of California, but was formed in the State of Nevada *after* the defendant and Lola Norris had crossed the boundary line between the States of California and Nevada.

As stated by the Supreme Court of the United States, in *Athanasaw v. United States*, 227 U. S. 326, 57 L. Ed. 528, in approving of the instructions of the trial Court in that case:

“ ‘The intent and purpose of the defendants *at the time* of the *furnishing* of this *transportation* for Agnes Couch is the *very gist and question* in this case’.”

This intent and purpose must, of course, have existed at the *time* of the *commission* of the *act* or *acts* by the defendant Caminetti, claimed by the prosecution to constitute a violation of the “White-slave traffic Act” under the first count of the indictment. There must, of course, be a joint union of act and intent, otherwise there is no offense. As stated, in the Supreme Court decision of *Athanasaw v. United States*, *supra*,

“ ‘The *intent and purpose* of the defendant’
* * * ‘*at the time* of the *furnishing* of this

*transportation' * * * is the very gist and question in the case'."*

The evidence clearly shows two things: First, that the intent and purpose of the defendant was not the intent and purpose denounced by the "White-slave traffic Act" and alleged against him in the first count of the indictment, to wit: that Lola Norris should live with him as his concubine; second, that the immoral purpose, if any was formed at all, was not formed and did not exist at the *time* of the *furnishing* of the *transportation*, and in fact did not exist and was not formed until *after* the defendant and Lola Norris *had crossed the boundary line into the State of Nevada*.

The evidence clearly shows that the intent and purpose of the defendant Caminetti, and of Lola Norris herself, was to leave Sacramento to escape the impending notoriety, scandal and disgrace, bodily harm and probable arrest, which they both believed would happen to them if they remained in Sacramento.

The testimony of Lola Norris is conclusive on this point. She testifies:

"Q. Was it not your idea and the idea of everybody to get out of Sacramento, to get out of town, and to escape the notoriety and disgrace?"

The COURT. Q. Was it to get out of Sacramento or to get out of the state?

A. We didn't want to get out of the state, we thought if we could possibly stay there and avoid it we were willing to do that and face

any disgrace that might come up; I don't remember that anything was said about getting out of the state. *The idea was to avoid any notoriety or scandal that might arise.*

Q. Without any particular place being mentioned?

A. No, sir." (Transcript of Record, p. 318.)

This intent and purpose was, manifestly, not an immoral one and was totally inconsistent and contrary to the intent and purpose alleged in the indictment.

How they should live after reaching Reno was not discussed or even considered by them, so far as the evidence discloses, until they had almost reached Reno, and certainly not until *after they had passed the boundary line between California and Nevada, and long after the furnishing of any transportation.* Assuming, which we deny, that the defendant did anything whatever to contribute to the furnishing of any transportation, the evidence in the record conclusively and irrefutably establishes the truth of what we here maintain. It was a most vital point in the case. It was the bone of a bitter contention between opposing counsel. For instance, Mr. Roche, in his opening argument to the jury, argued vigorously as follows:

"MR. ROCHE. They agreed *before they left the confines of the State of California and before the train reached Reno*, that they would take assumed names and would hire a bungalow at Reno.

MR. ANTHONY CAMINETTI. That is not the testimony, may it please the Court. You will

find the testimony on pages 222-225 of the record. *That was after they crossed the state line.*

Mr. ROCHE. I repeat it again, so there will not be any question of your understanding as to what I mean: *Before these parties reached the state line, and before the train passed from the confines of the State of California into the State of Nevada* these two men then agreed to take fictitious names, and that these two men at that time made up their minds that just as soon as that train reached Reno they would hire a bungalow in which the four of them were to live." (Transcript of Record, pp. 416, 417.)

The evidence in the record, to which we will now advert, establishes that we were correct and that the prosecuting attorneys and the trial Judge were in error.

M. L. Jones, the conductor upon the Southern Pacific Company's train that transported Lola Norris, the defendant Caminetti, Marsha Warrington and Maury I. Diggs from Sacramento to Reno, testified:

"I recall that the train reached Reno on the morning of the 10th at 11:47. * * * The train passed over the state line about 10:40 or a little later probably." (Transcript of Record, p. 158.)

Marsha Warrington testified:

"I recall the time the train reached Reno. Before the train reached Reno and during sometime that morning, Mr. Diggs and Mr. Caminetti discussed the question of renting a house of some sort. *Mr. Diggs and Mr. Cami-*

netti, Miss Norris and myself were to live in this house. That discussion took place just before we got to Reno. Possibly half an hour before. After alighting from the train at Reno we went to—I don't know where it was, and had lunch. I think it was the Thomas Grill. The four of us had lunch. The train reached Reno around noon I think." (Transcript of Record, p. 250.)

If the first discussion, as to what these four persons were to do and how they were to live after their arrival at Reno, took place half an hour before the train reached Reno, then unquestionably the discussion was had about 11 o'clock that morning or fully one-half an hour after the train had passed over the state line, which was at 10:40 or perhaps a little later, as testified to by the conductor, Jones. Such being the case, and the evidence is incontestable on that point, then no offense violative of the "White-slave traffic Act" was committed at all, for the reason that there was no intent and purpose of concubinage until after passing the state line and when within 30 minutes arrival of Reno, at which time the discussion first arose as to what they were to do and how to live during their sojourn in Reno.

That this is the fact is accentuated by the testimony both of Marsha Warrington and of Lola Norris.

Miss Warrington testified as follows:

"Q. You did not use that language. Were you asked this question, reading from page 381 of Miss Warrington's testimony, of the previous trial, a question put by the Court: 'Q. He

is asking you whether Mr. Diggs said in his talks with you in any specific way that he wanted you to go there for the purpose of living with him?

A. No. He did not say that.' 'Was that question asked of you and did you make that answer?'

Mr. ROCHE. What page is that?

Mr. HOWE. Page 381.

The COURT. What is the object of this?

Mr. HOWE. I want to show why she went to Reno.

The COURT. She has not on this occasion testified that any specific suggestion of that kind was made.

Mr. HOWE. But I am asking her if any specific suggestion was made.

The COURT. You can ask her what they went to Reno for.

Mr. HOWE. Q. Was there any specific suggestion made by Mr. Diggs that you should go there for the purpose of living with him?

A. No. He said he would get a divorce and marry me. *Mr. Diggs did not say to me at any time, that he wanted me to go over there for the purpose of living with him.*" (Transcript of Record, pp. 269, 270.)

At the very end of Marsha Warrington's examination, Mr. Roche asked the following question:

"Mr. ROCHE. I would like to ask just one question, with your Honor's permission.

Q. Miss Warrington, you were asked upon cross-examination what the specific intent was with which the four of you went to Reno. What conversation was there among the four of you, yourself, Miss Norris, Mr. Diggs and Mr. Caminetti as to what would be done by the four of you just as soon as you did reach Reno?

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent and not redirect examination; it is a matter that they went into very thoroughly on their case in chief and she has already testified to.

The COURT. Well, I will let this one question be answered.

Mr. HOWE. We note an exception.

A. We were to live there until they secured their divorces, which would be in six months.

Mr. ROCHE. Q. Live where, and with whom?

A. Mr. Diggs and Mr. Caminetti." (Transcript of Record, p. 280.)

It will be observed that the prosecuting attorney shrewdly abstained from fixing the time and place of this conversation. However, the previous testimony of Marsha Warrington fixes it as a conversation had on the train which "*took place just before we got to Reno. Possibly half an hour before*". (Transcript of Record, p. 250.) As we have seen, at that time the train, on which they were, had passed over the state line and was in the State of Nevada.

We have already referred to her testimony, on cross-examination, where Marsha Warrington said:

"Mr. Diggs did not say to me *at any time*, that he wanted me to go over there for the purpose of living with him." (Transcript of Record, p. 270.)

And, on redirect examination, she stated:

"There was a conversation before we reached Reno, as to what names should be assumed by Diggs and Caminetti. They discussed different names that they might use and finally

decided on Ross and Enright." (Transcript of Record, p. 273.)

Lola Norris, in her direct examination, stated as follows:

"Mr. ROCHE. Q. Did he say anything as to what was to become of you in the event that you went away with him?

Mr. DEVLIN. Your honor, I object to that as being leading and suggestive and not asking her to give the conversation. It is suggesting to her the subject matter.

The COURT. No, he is simply calling for any statement that was made, he is not asking her to state as to any particular thing.

Mr. DEVLIN. We note an exception.

A. I don't remember just exactly what he did say about that.

Q. Was there anything said during those conversations as to any contemplated marriage between yourself and himself?

Mr. DEVLIN. I object to that. The witness has answered the question. It is a very leading question.

Mr. ROCHE. We have a right to call her attention to a particular subject matter now.

The COURT. The objection is overruled.

Mr. DEVLIN. We note an exception.

A. On the Saturday before we left—that was the day before, Mr. Caminetti said that his wife would start action for divorce he knew as soon as she found out that he was gone and then we would be married; but before that I don't remember Mr. Caminetti saying anything about what his wife would do." (Transcript of Record, p. 296.)

Again, Lola Norris stated on her direct examination:

“No, there was nothing said as to how we were going to live.” (Transcript of Record, p. 302.)

Lola Norris was then referring to the two hours' conference with Diggs and Marsha Warrington held on Sunday afternoon (March 9, 1913) at the Plaza in Sacramento, at which conference the defendant Caminetti was not present, and at which conference both Miss Norris and Miss Warrington, after listening to what Diggs had to say, determined to leave Sacramento.

Miss Norris, on cross-examination, testified as follows:

“Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody.” (Transcript of Record, pp. 309, 310.)

Miss Norris, on cross-examination, also stated as follows:

“I am acquainted with a lady named Mrs. Garrison. She is quite a friend of my mother's.

I remember her being present at my house about March 13th, two or three days after I came back from Reno, just before noon, at my residence, 1021 "P" Street, Sacramento, there being present my mother, myself and Mrs. Joe Garrison. We had a conversation there on various subjects. I possibly said something to the effect there, *'I don't see how any testimony I could give could hurt Drew in any way because he never did anything that I asked him not to do or that I didn't want him to do.'* Yes, I did say that; I still trusted Mr. Caminetti then, and I would not believe when my parents told me how he had deceived me. I would not believe them. I still trusted him. I did not have to have anybody tell me." (Transcript of Record, pp. 325, 326.)

It must be evident, from the above references to the testimony of the two young women, Marsha Warrington and Lola Norris, that the flight from Sacramento was not with the purpose alleged in the first count of the indictment, and that the first discussion, as to what the defendant Caminetti and Lola Norris should do upon their arrival at Reno and how they should live, was not had until they were almost upon the point of arriving at Reno and after they had passed the state boundary line. The incontestable evidence, above referred to, show these to be the facts. Under these incontestable facts, there was no violation of any of the provisions of the "White-slave traffic Act". The acts of the defendant Caminetti and of Lola Norris may have constituted violations of the penal laws of the States of California or of Nevada; he may have

rendered himself amenable to a state prosecution in California for deserting his wife and children, or in Nevada for immoral conduct, or for some violation of the California Juvenile Act. But under the evidence adduced in this record, he was certainly not guilty of having transported, or caused to be transported, or aided or assisted in transporting Lola Norris, in interstate commerce, *with the intent and purpose that she should become his concubine*. In the first place, he did nothing to transport, or cause to be transported, or aid or assist in transporting in interstate commerce, and in the second place, the specific intent, which is an inseparable concomitant of the offense of which he was convicted, did not exist at the time of the furnishing of any transportation, or when he left Sacramento with Lola Norris, and was not thereafter formed while the train, on which they were traveling, remained within the jurisdiction of the state and Northern District of California, and, in fact, was not formed, or even discussed, or considered, until they had almost reached Reno, and some considerable time after passing the state boundary line.

It is important to note, in this connection, that Lola Norris does not admit that she ever had had any sexual intercourse with the defendant Caminetti until after their arrival in Reno and during their occupancy of the bungalow at that place. (Transcript of Record, p. 307; also see pp. 290, 294, 306.) Although she admits passing the night,

upon several occasions, with the defendant, as shown by the testimony above referred to, and also claims that she, of her own volition, got into the upper berth with the defendant upon the trip from Sacramento to Reno, only "because the couch grew uncomfortable" (Transcript of Record, pp. 324, 325), nevertheless she stoutly maintained, throughout her entire testimony, that the very first occasion of any sexual intercourse, not alone with the defendant, but with *any* man, took place after their arrival at Reno and not before. If this state of facts is to be believed, and it comes from the lips of the prosecuting witness herself, it simply lends support to the overwhelming evidence in the case that the intent and purpose, not only of the defendant, but of Lola Norris, at the time of the furnishing of transportation, was to leave Sacramento because of the impending scandal and disgrace resulting from their indiscretions in associating with each other and with Maury I. Diggs and Marsha Warrington, although unaccompanied with any sexual intercourse on the part of the defendant and Le' Norris, and that the intent and purpose of the defendant was not, at the time of furnishing of transportation (assuming, which we deny, that he did anything to contribute to the furnishing of the transportation for Lola Norris), that Lola Norris should become his mistress or concubine.

At any rate, the testimony is uncontradicted that the intent and purpose to transport Lola Norris, so

that she might become the mistress or concubine of the defendant, was not discussed or considered by the defendant or Lola Norris, or by Maury I. Diggs or Marsha Warrington, until the parties had almost reached Reno, and *after* passing the boundary line dividing Nevada and California, when, for the first time, the rash consequences of their flight from Sacramento dawned upon them, and the question then arose, and was discussed, as to how they were to live, or what they were to do, upon alighting at Reno. This may seem a curious and remarkable state of affairs but it is the truth as established by the record.

An authority applicable to the question under discussion is *People v. Black*, 147 Cal. 426. In that case, it was held that the *gist* of the offense of child-stealing consists of the taking and enticing away of a minor child with the intent both to detain and to conceal such child from the person having legal charge of it, and if either intent is lacking the offense is not made out.

It was further held that where all of the evidence is in the record, and is without conflict, and wholly fails to show any intent of the defendant both to detain and to conceal the child, or any evil intent, a question of law is presented, and a reversal will be ordered for insufficiency of the evidence to sustain the verdict.

The Supreme Court of California used the following language:

“The matter of intent, both as to detention and concealment, is made a question of fact under the provision of the section, and this question of fact is to be proven like any other fact, from the acts and conduct of the parties, considered in connection with all the other circumstances in the case. And while it is the peculiar province of a jury to find upon the fact of intent, and their finding thereon is generally conclusive, yet this conclusiveness exists only when the evidence bearing upon intent (when intent is made a question of fact) is such that the jury were warranted in reasonably inferring therefrom the existence of the particular intent made necessary by the law to be found by them in order to support their verdict. This is true when the evidence, even though meagre, is yet sufficient, if believed by the jury, to support their finding, and is always true when sufficient but conflicting evidence is presented upon the subject.

When, however, there is no conflict, and all the evidence which was before the jury, and from which they found upon the matter of intent, is before this Court, there is then presented a question of law whether such evidence was sufficient to sustain the finding of a specific intent, which the law requires shall exist in order to constitute an offense. This is the question presented here: whether the evidence which is undisputed was sufficient to warrant the jury in their finding (essential to support the verdict against defendant) that the girl Dottie was taken and enticed away by him with intent to detain her from her mother.”

So, in the case at bar, we maintain that, as all of the evidence which was before the jury, from which they found upon the matter of intent, is

before this appellate tribunal, there is presented a question of law whether such evidence was sufficient to sustain the finding of a specific intent, which the law requires shall exist in order to constitute an offense.

We contend that the uncontradicted evidence shows that the intent and purpose in leaving Sacramento for Reno was flight to avoid impending disgrace, exposure, scandal, notoriety, bodily harm and probable arrest; an intent and purpose totally inconsistent with the intent and purpose denounced by the "White-slave traffic Act" and alleged in the indictment.

Furthermore, in this connection, we contend, that the uncontradicted evidence shows that the intent and purpose, if any immoral intent and purpose existed, was not formed until after the defendant had left the confines of the state and Northern District of California, where the indictment charges the offense to have been committed, and was not actually formed, according to the testimony of Marsha Warrington herself, until they had almost reached Reno and a considerable time after they had passed the boundary line dividing California from Nevada.

Inasmuch as the uncontradicted evidence discloses all these to be the facts, we respectfully submit that a question of law is presented by the record as to the existence of the specific intent required by the "White-slave traffic Act", and that

this all-important question should be resolved in favor of the defendant.

The trial Judge instructed the jury on the question of intent, among other things: "It is therefore essential to the guilt of the defendant under any one of these counts that you find the existence of this intent *at the initiation of any such act.*" (Transcript of Record, pp. 431, 432.)

The "initiation" of any act of transportation, assuming, which we deny, that anything was done by the defendant in the nature of any act of transportation, took place at Sacramento, and yet the evidence is uncontradicted and irrefutable that the intent alleged in the indictment was not formed at Sacramento and did not come into existence until the defendant and Lola Norris had almost reached Reno and certainly not until after crossing the state boundary line.

One of two things results from this instruction. Either the trial Judge ignored the evidence, showing irrefutably that no intent and purpose, as alleged in the indictment, was formed or came into existence until after the defendant and Lola Norris had passed beyond the State and Northern District of California, in passing upon the motion to instruct the jury to acquit and subsequently in denying the motion in arrest of judgment; or the jury ignored the trial Judge's instruction on this subject.

Without further elaborating upon the assignments of error urged in this connection, we sub-

mit that, in view of the uncontradicted evidence in the case, the trial Judge should have granted the motion to instruct the jury to acquit on the ground of the insufficiency of the evidence to justify submitting the case to the jury, or should thereafter certainly have granted the motion in arrest of judgment.

The argument heretofore advanced as to the refusal of the trial Judge to grant the motion to acquit, or the motion in arrest of judgment, applies equally to the several exceptions taken to the refusal of the Court to strike out the testimony of each and every witness who testified. Such motions were based upon the ground that the testimony of none of the witnesses, either singly or collectively, was sufficient, in law, to justify a verdict against the defendant. In this connection, we refer to the following assignments of error: No. 19, Transcript of Record, pp. 49, 155, 156; No. 21, Transcript of Record, pp. 49, 159; No. 29, Transcript of Record, pp. 52, 176; No. 31, Transcript of Record, pp. 53, 176; No. 37, Transcript of Record, pp. 55, 192, 193.

The following colloquy between the Court and one of the counsel for defendant will disclose the purpose of the motions to strike out and the fact that none of the defendant's rights in that respect were lost:

“Mr. WOODWORTH. Now, if your Honor please, we make a similar motion to strike out the testimony of the witness (F. J. Peck), on

the ground that no foundation for the same has been laid, there is no proof of the *corpus delicti*, that it is immaterial, irrelevant and incompetent, and all the objections I previously urged.

The COURT. Mr. Woodworth, that seems an idle thing to make a suggestion of that kind. This is a part of the proof of the *corpus delicti*, as you term it, it is a part of the proof of the offense. They cannot prove it all with one witness. If the motions you have made with reference to the testimony of these witnesses were to be entertained no case in the world could be proven because the case must be proven piece-meal and by the testimony of different witnesses.

Mr. WOODWORTH. But finally, when the case is concluded, when the Government has concluded its case, and it has not proved all of the elements of this offense, then according to well established rule of law if we had not made these motions it may be urged that counsel is in default, and I would rather err on the side of an abundance of precaution than on the other side.

The COURT. But you are entirely in error as to the necessity of making these motions from time to time during the making of the case by the other side. You are entitled to wait until such a case as they have is made and then you may make the motion that the evidence be stricken out upon the ground that it is not connected with the defendant.

Mr. WOODWORTH. Very well, then. I will make the motion then.

Mr. ROCHE. And of course then, may it please the Court, if it is not connected up your Honor would advise the jury to acquit the defendant.

The COURT. Certainly. That is the way that thing would be met. But to make these motions with reference to separate and indi-

vidual witnesses whose testimony goes to make up the whole is idle.

Mr. WOODWORTH. Very well, I will observe your Honor's direction." (Transcript of Record, pp. 192, 193.)

We submit, if the motions to strike out the testimony of each witness, as he testified, were not proper, that the trial Judge should have granted the motion to instruct the jury to acquit, or thereafter the motion in arrest of judgment on the ground that there was not sufficient evidence, in law, to uphold the verdict and judgment of conviction on the first count of the indictment.

But even if the trial Judge did not feel justified in granting the motion to acquit, we respectfully submit that he should, at the very least, have given some of the following instructions requested on behalf of the defendant:

"You are further instructed that, in the first count of the indictment, the defendant is charged with having wilfully, knowingly and feloniously unlawfully transported and caused to be transported, and aided and assisted in obtaining transportation for, and in transporting in interstate commerce from Sacramento in the State and Northern District of California, to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific, a certain girl, to wit, one Lola Norris, for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the mistress of the said defendant.

You are instructed, under this first count of the indictment, that before you will be authorized or justified in convicting the defendant, you must first be satisfied to your entire sat-

isfaction and beyond all reasonable doubt that the defendant did some act of a material, substantial character by virtue of which, the said Lola Norris was transported or caused to be transported, or aided or assisted in obtaining transportation for, and in transporting her in interstate commerce; And in this connection, I charge you that the act of transportation, or of causing to be transported or aiding or assisting in obtaining transportation, must have been some such act as that which led to the purchase of tickets, or furnishing the means with which to purchase tickets, or some such act resulting in the transportation, and unless you are satisfied to a moral certainty and beyond all reasonable doubt that the defendant did commit some substantial material act resulting in the transportation of Lola Norris for the purpose alleged in the indictment and with which the intent denounced by the law and alleged in the indictment, it will be your sworn duty to acquit him." (Transcript of Record, pp. 115, 116, 464; Assignment of Error, No. 189.)

"You are further instructed that it is not sufficient for the prosecution to show to your entire satisfaction and beyond all reasonable doubt, that the defendant was present, if you should find that he was present, at the time that the tickets were purchased by Maury I. Diggs, or that he knew that said tickets had been purchased by Maury I. Diggs, but it is incumbent on the prosecution to prove to your entire satisfaction and beyond all reasonable doubt that the defendant not only was present at the time the tickets were purchased by Maury I. Diggs and that he knew the purpose for which the tickets were purchased by said Maury I. Diggs, but it must prove, as alleged in the first and second counts of said indictment, that said defendant did some act of a

material, substantial nature in transporting or causing to be transported, or in aiding or assisting in obtaining transportation for Lola Norris and Marsha Warrington, or either of them, in interstate commerce for the specific purpose of debauchery and for the immoral purpose alleged in the indictment, and unless you shall so find beyond all reasonable doubt, it will be your duty to acquit the defendant.” (Transcript of Record, pp. 116, 117, 465; Assignment of Error, No. 190.)

“You are hereby further instructed that if you are satisfied from all of the evidence presented in the case that the intent and purpose of the defendant in going from Sacramento to Reno was to avoid scandal and notoriety and was not for the purpose alleged in the four counts of the indictment namely, a purpose of debauchery and for an immoral purpose in that Lola Norris and Marsha Warrington should become the concubines and mistresses of the defendant and Maury I. Diggs respectively, or if you have a reasonable doubt, after considering all the evidence in the case, as to the real purpose and intent of the defendant in going from Sacramento to Reno, or as to the real purpose and intent of the defendant, in doing any of the acts charged against him in the indictment then it is your sworn duty to acquit the defendant.” (Transcript of Record, pp. 117, 465, 466; Assignment of Error, No. 191.)

“You are further instructed that the mere presence or the mere knowledge of the defendant of the commission of the offenses claimed by the prosecution to have been committed by Maury I. Diggs, and with which this defendant is also charged in a separate indictment, is not sufficient to warrant his conviction or to justify you in finding him guilty.

You must be satisfied, beyond all reasonable doubt, not only that he was present or had

knowledge of the commission of the offenses claimed by the prosecution to have been committed by Maury I. Diggs, but you must be further satisfied, beyond all reasonable doubt, that he then and there knew that the specific intent and purpose of said Maury I. Diggs in committing the offenses claimed by the prosecution to have been committed by said Maury I. Diggs was the specific purpose and intent denounced by the White Slave Traffic Act, to wit, for the purpose of debauchery and for an immoral purpose as alleged in the indictment.

Moreover, you must further be satisfied, beyond all reasonable doubt, not only that the defendant had the knowledge of the intent and purpose of said Maury I. Diggs in committing offenses claimed by the prosecution to have been committed by said Maury I. Diggs and in which it is claimed by the prosecution the defendant wilfully and knowingly participated, but you must further be satisfied, beyond all reasonable doubt, that the defendant, having such knowledge, just referred to, did aid, or abet, or counsel, or command, or induce, or procure the commission of the offenses claimed by the prosecution to have been committed by said Maury I. Diggs, and if you have any reasonable doubt as to any of the matters just referred to, it is your sworn duty to give the defendant the benefit of that doubt and acquit him." (Transcript of Record, pp. 117, 118, 466, 467; Assignment of Error, No. 192.)

"The Court instructs you that it is not a crime under the laws of the United States for the defendant to have performed the acts set forth in the indictment, if the same were wholly committed in the State of California, nor would the same be a crime, by the laws of the United States, under the allegations of the indictment, unless the defendant used a common carrier engaged in business of transporting and carrying passengers in interstate

commerce for the purpose that Lola Norris should become the concubine and mistress of the defendant. If you do not find from all the evidence that the defendant used a common carrier engaged in the business of transporting and carrying passengers in interstate commerce for the purpose that Lola Norris should become the concubine and mistress of the defendant, it will be your duty to find the defendant not guilty." (Transcript of Record, pp. 111, 460; Assignment of Error, No. 181.)

"You are hereby further instructed that the specific intent denounced by the statute, known as the White Slave Traffic Act, and alleged in the indictment must have existed at Sacramento, State and Northern District of California, the place where the offenses are alleged to have been committed, or at least within the State and Northern District of California, and must have existed at the time the alleged violations of the statute in question are charged to have been committed, and if it should appear from the evidence that the specific intent and purpose denounced by the White Slave Traffic Act and alleged in the indictment was not formed and did not exist until after the parties transported had passed the boundary line dividing California from Nevada, then it is your duty to acquit this defendant, as the intent must have existed at the time of the commission of the acts complained of, which are charged in the indictment to have been committed in Sacramento, State and Northern District of California." (Transcript of Record, pp. 120, 468; Assignment of Error, No. 196.)

These requested instructions and the failure of the trial Judge to give them, are again referred to under subsequent subdivisions of this opening brief.

VI.

The Prosecuting Attorneys Committed Reversible Errors In Making Improper Comments and Arguments to the Jury, and the Trial Judge Likewise Fell Into Error In Permitting the Prosecuting Attorneys to Make Improper Comments and Arguments to the Jury, and In Not Checking or Reproving Them at the Time, but on the Contrary, In Approving and Endorsing the Improper Comments and Arguments.

At the very outset of his opening argument, Mr. Roche made the following highly improper and unfair statement to the jury:

“MR. ROCHE. ‘Mr. Woodworth would not state to you that he proposed to establish the defendant’s innocence; the strongest he would go was that he would create a reasonable doubt.’

MR. WOODWORTH. We take an exception to the remarks of counsel; that is not the position taken here.

THE COURT. I cannot recall definitely the opening statement.

MR. ROCHE. The last remark that Mr. Woodworth made in his opening statement, and the record will sustain my position, was that he expected to create a reasonable doubt in the minds of the jury as to the guilt of this defendant.

THE COURT. I recall that he used that, but I don’t think that he stopped at saying that he would raise merely a reasonable doubt.

MR. WOODWORTH. Why, no, of course not. That is absurd.” (Transcript of Record, pp. 82, 414; Assignment of Error No. 124.)

Mr. Woodworth, as well as his associates, throughout the entire trial of the case, as the Transcript of Record shows, vigorously, steadfastly and insistently proclaimed and advocated the innocence of the defendant Caminetti from any knowing, wilful or felonious infraction of the "White slave traffic Act". A mere reading of Mr. Woodworth's opening statement to the Court and jury, as disclosed on pages 357-362 of the Transcript of Record, affords of itself ample refutation of the suggestion, gratuitously thrown out by the able and astute prosecuting attorney, that Mr. Woodworth "*would not state to you that he proposed to establish the defendant's innocence; the strongest he would go was that he would create a reasonable doubt.*"

At the conclusion of an opening address occupying some considerable time, Mr. Woodworth concluded:

"And, gentlemen of the jury, *having established that*, or having raised a reasonable doubt in your minds as to the real intent and purpose of the defendant in leaving Sacramento in view of all the surrounding circumstances, *we will ask you to give him the benefit of that doubt, and acquit him.*" (Transcript of Record, p. 362.)

The expression used by Mr. Woodworth, "*having established that*", obviously had reference to the previous statements made by him, in which he had detailed to the jury the proofs to be adduced

on the part of the defendant, showing his innocence.

It was highly improper and unfair for the prosecuting attorney to seize upon this one isolated statement of Mr. Woodworth, viz: "or having raised a reasonable doubt, etc., etc.", as being tantamount to an admission that "Mr. Woodworth would not state to you that he proposed to establish the defendant's innocence; the strongest he would go was that he would create a reasonable doubt".

The concluding remarks of Mr. Woodworth were, of course, to be considered in connection with his previous statements and address as an entirety. He simply told the jury that, having established what he stated he proposed to prove on behalf of the defendant, he would ask them *to acquit* the defendant, and he coupled that statement with the further one that if there was a reasonable doubt in the minds of the jury as to the real intent and purpose of the defendant in leaving Sacramento, it should give him the benefit of that doubt. This statement was perfectly proper. It is the well settled law. The defendant was entitled to the presumption of innocence. The burden of proof was upon the prosecution. This burden never shifts in a criminal case. If there was any reasonable doubt as to the intent and purpose of the defendant in leaving Sacramento, the jury, under the law, was compelled to give the defendant the benefit of that doubt. The "intent and purpose" *at the time of*

the *furnishing* of the *transportation*, was the “very gist and question” in the case.

Athanasaw v. U. S., 227 U. S. 326.

What Mr. Woodworth asked the jury to do was perfectly legitimate and proper, and in keeping with his duty and obligation as an attorney defending one accused of crime. The prosecuting attorney had no right to distort the meaning of what Mr. Woodworth had stated or to endeavor to impress the jury with the idea that Mr. Woodworth had practically admitted his client’s guilt and only expected to create a reasonable doubt in the case. His conduct in that respect was eminently unfair and highly improper, and was prejudicial to the defendant’s substantial right to a fair and impartial trial.

Hall v. U. S., 150 U. S. 76; 37 L. Ed. 1003;

Williams v. U. S., 168 U. S. 382; 42 L. Ed. 509.

We also contend that the following remarks made by Mr. Roche, in his opening argument on behalf of the prosecution, to which exceptions were taken, were also highly improper and prejudicial to the defendant:

“MR. ROCHE. He hides himself behind the respectability of a loyal wife.

MR. WOODWORTH. That is inflammatory and not based on any facts.

THE COURT. *Counsel must have some latitude.* Proceed.” (Transcript of Record, pp. 84, 414; Assignment of Error No. 126.)

* * * * *

"Mr. ROCHE. He deserted and abandoned his family and left them without a dollar because on the date that he did abandon them he assigned to some third party every dollar due him from the Board of Control.

Mr. WOODWORTH. We take an exception to the remarks of counsel as being highly inflammatory.

The COURT. *Whenever counsel transgresses what I deem proper comments on the evidence I will stop him.*" (Transcript of Record, pp. 83, 414, 415; Assignment of Error No. 125.)

* * * * *

"Mr. ROCHE. It is the duty of every juror to carry out the law as given to him by the Court. *If he don't do that innocent men may be convicted or guilty men go unwhipped of justice.*

Mr. WOODWORTH. We object to the remarks of counsel, speaking about the duties of jurors and the law. Your honor has repeatedly told me that I could not refer to the law of the case.

The COURT. *He is not discussing the law.*

Mr. WOODWORTH. He is not discussing the facts of the case. We take an exception.

The COURT. Proceed." (Transcript of Record, pp. 84, 415; Assignment of Error No. 127.)

* * * * *

"Mr. ROCHE. *The people of these United States are watching this case and waiting to ascertain whether upon such a record as has been made here, under the law of this case, as it will be given to you by the Court, this defendant shall go unwhipped of justice.*

Mr. WOODWORTH. We object to any such statement, that the people of these United States are looking upon this case as inflammatory and intended to move the jury by passion. We except to such remarks.

The COURT. *Avoid any reference to anything not in evidence. It is a mere figure of speech, a mere reference to one of those things which counsel frequently call in as an aid to argument. It is very difficult to regulate those things.*" (Transcript of Record, pp. 89, 419; Assignment of Error No. 138.)

* * * * *

"Mr. ROCHE. The Government of these United States, gentlemen of the jury, whom we have the honor to represent here, your Government as well as my Government, the Government of all of us, *demands that the laws enacted for the protection and preservation of its young and decent women be adequately and rigidly enforced. An acquittal in this case would be a miscarriage of justice and it would be a blot upon the fair name and escutcheon of California.*

Mr. WOODWORTH. Another exception to those remarks." (Transcript of Record, pp. 90, 419, 420; Assignment of Error No. 139.)

* * * * *

"Mr. ROCHE. On behalf of myself, on behalf of the State of California, on behalf of the Government of the United States of America, I ask you gentlemen of the jury by your verdict whether you intend to do such as this.

Mr. WOODWORTH. We note an exception to that." (Transcript of Record, pp. 90, 420; Assignment of Error No. 140.)

We submit that these remarks were entirely too inflammatory and were, confessedly, employed to influence and sway the jurors by passion. They were not justified by any testimony in the case;

especially when the evidence against the defendant was as meagre as it was in the case at bar.

People v. Hail, Vol. 19, Cal. App. Dec. 298,
309 et seq., and many cases there cited;

Wells v. State, 145 S. W. 950;

Wilson v. State, 128 N. W. 38;

People v. Crosby, 17 Cal. App. 518;

People v. Burke, 145 Pac. 950;

Collins v. State, 145 S. W. 1065;

Collins v. State, 56 So. 527;

Parker v. State, 75 So. 437;

Com. v. Nicely, 130 Pa. 261; 18 Atl. 737;

Watson v. State, 7 Okl. Cr. 590; 124 Pac.
1101;

Williams v. U. S., 168 U. S. 382;

Hall v. U. S., 150 U. S. 76;

Graves v. U. S., 150 U. S. 118;

People v. Warr, 136 Pac. 304;

Brailaforde v. State, 158 S. W. 541;

Miller v. State, 69 S. E. 922;

Territory v. Cordova, 11 N. M. 367; 68
Pac. 919;

State v. Blackman, 108 La. Ann. 121; 32
So. 334;

People v. Bissert, 172 N. W. 634;

Ward v. State, 77 Ark. 19; 90 S. W. 619;

Ivey v. State, 54 L. R. A. 459;

State v. Proctor, 86 Iowa 699.

The following highly improper comments and remarks were made by Mr. Matt I. Sullivan, during his closing argument in behalf of the prosecution:

“Mr. SULLIVAN. *If you believe in the sanctity of the home, if you believe in upholding the moral law, if you believe all laws should be enforced independent of position, influence or wealth your verdict in this case on each and every count must be guilty.*

Mr. WOODWORTH. We take an exception, if your Honor please. We except to the language of counsel upon the ground it is inflammatory, that it is not proper coming from the prosecuting attorney.

The COURT. *Mr. Woodworth, I would not interrupt unless there was some reasonable ground for it. Counsel have proper limitations in their arguments.*

Mr. WOODWORTH. I did feel that it was my duty to object, may it please your Honor, I did think I had reasonable ground and still think so.” (Transcript of Record, pp. 90, 91, 420, 421; Assignment of Error No. 141.)

* * * *

“Mr. SULLIVAN. Now, is there one among you that upon his oath can say that the defendant did not aid and assist in the transportation of Lola Norris from Sacramento to Reno for an immoral purpose? If you believe that his purpose was immoral, that his purpose was to live with Lola Norris in Reno, *there is not one man among the twelve of you who has regard for the laws of the country or regard for his oath, I take it—*

Mr. WOODWORTH. We certainly except to that.

The COURT. Read the record. (Record repeated by the reporter.)

Mr. SULLIVAN (continuing). *Can render a verdict of not guilty.*” (Transcript of Record, pp. 93, 94, 423; Assignment of Error No. 145.)

* * * *

We submit that these remarks were also entirely too inflammatory, and were, obviously, employed to influence and sway the jurors by passion. They were not justified by any evidence in the case. The alleged "victim", Lola Norris, herself exonerates the defendant Caminetti from any immoral or lascivious purpose in leaving Sacramento. We again quote her testimony:

She further testified:

"Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody." (Transcript of Record, pp. 309, 310.)

Marsha Warrington testified:

"Mr. Diggs did not say to me at any time, that he wanted me to go over there for the purpose of living with him." (Transcript of Record, p. 270.)

Inasmuch as the question of the intent and purpose of the defendant in leaving Sacramento with Lola Norris was one of the vital points in the case,

it is submitted that the testimony of the prosecuting witness herself did not justify the harsh, severe and ~~a~~scerbious language of the prosecuting attorneys, and that the use of such invective could have had no result other than to inflame the minds of the jury and to move them to render a verdict against the defendant from passion and prejudice.

It would prolong to an unpardonable length this already, we fear, too voluminous brief, to refer in detail to the very many authorities, both in the federal and state Courts, holding that remarks of prosecuting officers, similar to those employed in the case at bar, constitute misconduct and reversible error, and that the action of the trial Judge, in not checking or reproving the prosecuting officers and in not instructing the jury to disregard the improper remarks and arguments, is equally reprehensible and erroneous. We content ourselves by referring to but a few of the leading authorities on this subject.

In the well considered case of *People v. Hail*, Vol. 19 Cal. App. Dec. 298, 309 et seq., where quite a number of authorities are considered, it appeared that, in the course of his argument to the jury, the district attorney said:

“Men have been acquitted who have committed cold blooded murder, and *if you were to acquit this man under the testimony here* you would be allowing a cold-blooded murderer with human gore yet dripping upon his hands to go *unwhipt of justice*; gentlemen, you cannot do it, you will not do it. *Should you do*

it you would be afraid to go out on the street and meet your fellow-men."

These remarks of the prosecuting attorney, in the case cited, are upon a par with the remarks of the prosecuting attorneys in the case at bar, both in their opening and closing arguments, as above set forth in this Opening Brief. They have but to be compared to appreciate their substantial similarity, especially those portions italicized by us in the preceding pages of this Opening Brief.

The trial Court, in the case cited, refused or omitted to check or reprove the prosecuting attorney, or to instruct the jury to disregard the remarks, saying: "I don't understand it; to me it doesn't mean anything; *Proceed.*" (Vol. 19 Cal. App. Dec. p. 309.)

The trial Judge, in the case at bar, not only refused to check or reprove the prosecuting attorneys in their objectionable remarks to the jury, both in their opening and closing arguments, or in instructing the jury to disregard the remarks, but, on the contrary, approved of them, stating on one occasion, when exception was taken to the remarks of the prosecuting attorneys as being highly inflammatory:

"Whenever counsel transgresses what I deem proper comments on the evidence I will stop him." (Transcript of Record, pp. 83, 414, 415; Assignment of Error No. 125.)

Again, on another occasion, stating, in reply to a protest of counsel for the defendant:

“Counsel must have some latitude, *Proceed.*” (Transcript of Record, pp. 84, 414; Assignment of Error No. 126.)

Again, over the remonstrance of counsel for defendant that:

“We object to the remark of counsel, speaking about the duties of jurors and the law. Your Honor has repeatedly told me that I could not refer to the law of the case”, the trial Judge answered: “He is not discussing the law. * * * *Proceed.*” (Transcript of Record, pp. 84, 415; Assignment of Error No. 127.)

Again, upon another occasion when counsel for defendant strenuously objected to the remarks of the prosecuting attorney, in his opening argument, wherein he had said:

“The people of these United States are watching this case and waiting to ascertain whether upon such a record as has been made here, under the law of this case, as it will be given to you by the court, this defendant shall go unwhipped of justice,” the trial Judge contented himself by saying: “Avoid any reference to anything not in evidence. *It is a mere figure of speech, mere reference to one of those things which counsel frequently call in as an aid to argument. It is very difficult to regulate those things.*” (Transcript of Record, pp. 89, 419; Assignment of Error No. 138.)

Again, upon another occasion when one of the prosecuting attorneys was making his closing argument, in which he said, among other things:

“If you believe in the sanctity of the home, if you believe in upholding the moral law, if you believe all laws should be enforced independent of position, influence or wealth, your verdict in this case on each and every count must be guilty”, to which language one of the attorneys for the defendant took exception in the following words: “We take an exception, if your Honor please. We except to the language of counsel upon the ground it is inflammatory, that it is not proper coming from the prosecuting attorney”, the trial Judge replied. “Mr. Woodworth, I would not interrupt unless there was some reasonable ground for it. Counsel have proper limitations in their arguments.” (Transcript of Record, pp. 90, 91, 420, 421; Assignment of Error No. 141.)

These excerpts will show the applicability, to the case at bar, of the language of the District Court of Appeal of California in the case cited of *People v. Hail*, supra. That Court said:

“That the effect of the statement that the jurors, in the event that they acquitted the defendant, would be afraid to go out upon the public streets and meet their fellowmen, *was to intimidate or influence them to return a verdict of conviction, regardless of their views as to the effect of the evidence*, cannot for a moment be doubted. *Whether the language referred to was used in good faith or for the purpose of influencing a verdict, is immaterial. The vice and damaging effect of the utterance upon the rights of the accused remained.* In a case where evidence of guilt was overwhelming or

conclusive, we might justly say that the language was not prejudicial in its effect upon the legal rights of the defendant, although the use of such language would in such case be none the less reprehensible. But this is, as we have shown, not such a case." (19 Cal. App. Dec. p. 310; italics ours.)

So, in the case at bar, the language of the prosecuting attorneys was calculated "to intimidate or influence them (the jury) to return a verdict of conviction, regardless of their views as to the effect of the evidence". It matters not, as pointed out by the District Court of Appeal, in the passage just quoted, that the "language referred to was used in good faith or for the purpose of influencing a verdict". Furthermore, as stated by the District Court of Appeal, in the passage just quoted, the language employed is much more reprehensible in a case where the evidence, as in the case at bar, is very meagre, than in a case where evidence of guilt is overwhelming or conclusive.

The District Court of Appeal, in the case of *People v. Hail*, supra, further says:

"The language complained of amounts, substantially, to a direct declaration to the jury that, if they did not convict the defendant, they would lose the respect and confidence of their friends and neighbors. Thus the question of the honesty and the integrity of the jury was injected into the case. In other words, the jurors themselves were put upon trial by the district attorney, and whether they could bravely meet their fellow-citizens and face them with clear consciences was made by that official to depend upon whether they found the defendant guilty"

(3) A public prosecutor represents all the people, of whom every person accused of violating public law is none the less one because he is so accused. He represents the majesty of the law, which stands for the protection of every citizen against the taking of his life, his liberty or his property without its due process—the law which condemns rather than commands the conviction of a person of a public offense upon insufficient evidence or by unfair means. That official should always do his sworn duty, of course, but he should always do it fairly and justly and not permit the great power with which he is clothed to be converted into an instrument of persecution. He should, as indeed, any lawyer should, in his address to a jury, *remain strictly within the record and not attempt to evolve any theory or to import into the case any features not fairly and reasonably justified by the proofs.*
* * *

The cases are replete with severe arraignments of prosecuting officers for unfairness in the presentation of cases against persons accused of crime, and there have been very justly recorded many reversals for misconduct no more obnoxious than that complained of in the case at bar. The number of such cases is so large that it would greatly extend the length of this opinion—now more extended than had been desired—to attempt to notice all of them. We shall examine a few of them, however.” (19 Cal. App., pp. 310, 311.) (*Italics ours.*)

The District Court of Appeal then proceeds to consider and to quote liberally from the following authorities:

People v. Bowers, 79 Cal. 415;

People v. Ah Lean, 92 Cal. 282;

Tucker v. Henniker, 41 N. H. 319;

People v. Mull, 60 N. E. 629;

which are also applicable to the case at bar and support the contentions we make in this regard.

The District Court of Appeal then proceeds and concludes as follows:

“Thus we have presented excerpts from a few of the cases upon the proposition under review, not for the reason that it is not clear in principle that reversals should be ordered where public prosecutors resort to the practice of bringing into their cases *under the guise of argument or otherwise matters wholly outside the records and which are obviously calculated to influence juries, either consciously or unconsciously, in arriving at verdicts of guilty, contrary to the evidence and the law*, but to show how such practice is uniformly condemned in strong language by the higher courts.

There are innumerable other cases in which similar views are expressed and like conclusions reached, and the practice referred to severely and justly condemned. It is not necessary here to review those cases, but among them the following will be found to be cogently applicable to the case at bar and instructive upon the question in hand: People v. Fielding, 158 N. Y. 542, 53 N. E. 496; People v. Butler, 8 Cal. 463; Vickers v. United States, 98 Pac. 467, 473; State v. Kauffman, 118 N. W. 337; State v. Underwood, 77 N. C. 502; State v. Robert, 131 Mo. 328; People v. Devine, 95 Cal. 231; People v. Chew Bock Hue, 18 Cal. App. Dec. 634; People v. Fleming, 166 Cal. 357; People v. Tufts, 47 Cal. Dec. 277.

Our conclusion is that, with the defendant's guilt *very doubtful under the evidence, the remarks of the district attorney above quoted*

were most damaging to the legal rights of the accused, that thereby he was deprived of a fair and impartial trial, and that the result reached by the jury, if permitted to stand under the circumstances, would involve a miscarriage of justice.

The judgment and order are reversed and the cause remanded." (Italics ours.)

In the case of *Watson v. State*, 7 Okl. Cr. 590, 124 Pac. 1101, it appeared that the district attorney, in his closing argument to the jury, used the following language:

"He (defendant) is guilty of murder and he ought to suffer for it. *The people in this courtroom are here DEMANDING that justice be meted out to this defendant and I know that you will do it when you retire to deliberate upon your verdict in the jury room.*"

The Court, in reversing the conviction, quoted the following language from *Cox v. State*, 2 Okl. Cr. 668:

"The authorities are numerous as to what constitutes improper conduct. They are uniform in holding any statement improper that is calculated to inflame the minds of the jurors, arouse their prejudice or appeal to their passions."

This decision, and that of *People v. Hail*, *supra*, are peculiarly applicable to the remarks of the prosecuting attorneys in the case at bar, when they said:

"Mr. ROCHE. *The people of these United States are WATCHING this case and waiting to ascertain whether upon such a record as has*

been made here, under the law of this case, as it will be given to you by the Court, this defendant shall go unwhipped of justice." (Transcript of Record, pp. 89, 419; Assignment of Error No. 138.)

And, again when they said:

"Mr. ROCHE. The Government of these United States, gentlemen of the jury, whom we have the honor to represent here, your government as well as my government, the government of all of us, DEMANDS that the laws enacted for the protection and preservation of its young and decent women be adequately and rigidly enforced. An acquittal in this case would be a miscarriage of justice and it would be a blot upon the fair name and escutcheon of California." (Transcript of Record, pp. 90, 419, 420; Assignment of Error No. 139.)

And again when they said:

"Mr. ROCHE. On behalf of myself, on behalf of the State of California, on behalf of the Government of the United States of America, I ask you gentlemen of the jury by your verdict whether you intend to do such as this." (Transcript of Record, pp. 90, 420; Assignment of Error No. 420.)

And again when they said:

"Mr. SULLIVAN. If you believe in the sanctity of the home, if you believe in upholding the moral law, if you believe all laws should be enforced independent of position, influence or wealth, your verdict in this case on each and every count must be guilty." (Transcript of Record, pp. 90, 91, 420, 421; Assignment of Error No. 141.)

And again when they said:

“Mr. SULLIVAN. Now, is there one among you that upon his oath can say that the defendant did not aid and assist in the transportation of Lola Norris from Sacramento to Reno for an immoral purpose? If you believe that his purpose was immoral, that his purpose was to live with Lola Norris, there is *not one man among the twelve of you who has regard for the laws of the country or regard for his oath, I take it, can render a verdict of not guilty.*” (Transcript of Record, pp. 93, 94, 423; Assignment of Error No. 145.)

In the case of *Collins v. State*, 148 S. W. 1065, the prosecuting officer, in his argument to the jury, where the defendant was charged with an assault with an intent to commit rape, said: “If you don’t convict the defendant in this case, there is no use for the grand jury of your county to hereafter indict any man for the detestable crime of assault with intent to commit rape in your county.” These remarks were considered improper but unavailing to defendant for reversal, in view of the trial Court’s instruction to the jury that they were improper and to disregard them.

In *Com. v. Nicely*, 130 Pa. 261, 18 Atl. 737, the Supreme Court of Pennsylvania said, in commenting upon the duty of a prosecuting officer:

“He should act impartially. He should present the commonwealth case fairly, and should not press upon the jury any deductions from the evidence that are not strictly legitimate. When he exceeds this limit, and in hot zeal seeks to influence them by appeal to their preju-

dices he is no longer an impartial officer, but becomes a heated partisan."

In the case of *Williams v. U. S.*, 168 U. S. 382, on the trial of an immigration inspector for extortion, the prosecuting officer remarked in the presence of the jury, that, "No doubt every Chinese woman who did not pay defendant was sent back" (to China). The overruling of defendant's objection to the remark was held to be error and the case was reversed on this, among other, grounds.

In the case of *Territory v. Cordova*, 11 N. M. 367, 68 Pac. 919, a statement employed by the prosecutor in addressing the jury: "The verdict of the people and the community is that the defendant is guilty", was held to be an improper and prejudicial expression, demanding a rebuke from the trial Court.

In the case of *State v. Blackman*, 108 La. 121 Ann., 32 So. 334, the statement made by the prosecuting attorney in his closing argument:

"If there is a man on the jury who does not believe this man ought to be hung, then he is unfit to sit on the jury,"

was held to be prejudicial misconduct and cause for reversal.

We refer to another comment of the prosecuting attorney, in his opening argument, to which exception was taken and which we believe to have been highly improper. It is as follows:

"Mr. ROCHE. It is difficult for me to distinguish all of the evidence in this case from all of the evidence in the Diggs case.

Mr. WOODWORTH. We object to any reference to the Diggs case.

The COURT. Yes, the evidence that was before the jury in the Diggs case is not here.

Mr. ROCHE. That is true, but the fact that some of these witnesses testified in the other trial has been made apparent by some of the witnesses here. I do not propose to refer to that testimony, however.

Mr. WOODWORTH. We take an exception.” (Transcript of Record, pp. 88, 418; Assignment of Error No. 134.)

The fact was notorious, and was known to the jurors, that Maury I. Diggs had just previously been convicted upon a similar charge. The trial Judge permitted the introduction of a great deal of evidence as to the acts and conduct of Maury I. Diggs and Marsha Warrington, with which the defendant Caminetti had nothing whatsoever to do, upon the theory that the accusation against the defendant Caminetti was akin to a conspiracy and that therefore the act or statement of one confederate was admissible against the other. To this theory, in permitting of the introduction of much evidence which, we believe, to have been very damaging to the defendant Caminetti, we objected vigorously and continuously, but our objections were overruled. We do not think the prosecuting attorney should have made the remarks above referred to, calling the attention of the jury to the Diggs case and telling them that “it is difficult for me to distinguish all of the evi-

dence in this case from all the evidence in the Diggs case”.

Other highly improper and prejudicial remarks were as follows:

“Mr. ROCHE. The defendant was not too agitated or frightened to request Maury I. Diggs and Marsha Warrington to go into the lower berth and to request Lola Norris to get into the upper berth.

Mr. WOODWORTH. There is no evidence that the defendant requested Maury I. Diggs to get into the lower berth. We take an exception to that.

The COURT. *Proceed. That is an inference that the jury may draw from the evidence, if they see fit.*” (Transcript of Record, pp. 88, 418; Assignment of Error No. 135.)

This statement, on the part of Mr. Roche, was not supported by the evidence and, in fact, was directly contrary to the evidence. The defendant Caminetti at no time requested Maury I. Diggs and Marsha Warrington to go into the lower berth, nor did he request Lola Norris to get into the upper berth with him. The uncontradicted testimony is as follows on this point:

“Mr. Diggs and Miss Warrington occupied the lower berth and I lay on the couch for about half an hour and then Mr. Caminetti and I occupied the upper berth. I don’t know whether Mr. Diggs took off any of his clothing before he got into the berth. I think he did. Mr. Caminetti took off his coat; I don’t remember anything else. We remained in those berths all night.” (Testimony of Lola Norris on her direct examination, Transcript of Record, pp. 305, 306.)

There is not the slightest intimation, in the above testimony, that the defendant at any time requested Maury I. Diggs and Marsha Warrington to go into the lower berth or Lola Norris to get into the upper berth with him. On cross-examination, Lola Norris testified as follows:

“When we got on the train at Sacramento Mr. Diggs and Miss Warrington got into the lower berth and I got on the couch. I stayed on the couch about half an hour. It was made up when I got on the couch. In the meantime Mr. Caminetti was in the upper berth. I stayed on the couch about half an hour and then got in the upper berth *because the couch grew uncomfortable.*” (Transcript of Record, pp. 324, 325.)

Certainly, the above testimony did not justify the prosecuting attorney in making the rash and prejudicial statement, in his opening argument to the jury, that

“The defendant was not too agitated or frightened to request Maury I. Diggs and Marsha Warrington to go into the lower berth and to request Lola Norris to get into the upper berth.”

An examination of the testimony of Marsha Warrington also conclusively shows that the prosecuting attorney was not warranted, by anything in the testimony, in making the remarks objected to and approved by the trial Judge. Marsha Warrington testified, on her direct examination:

“Mr. Diggs paid for the drawing room. As soon as the porter had made up the drawing room the four of us went in. There were two

berths and a little couch in the drawing room. After entering the drawing room I retired. I retired into the lower berth. I discarded just my skirt and waist. Mr. Diggs got into that berth with me. Mr. Diggs discarded his coat and shirt I think, I think he took all his clothes off. Lola Norris got into the upper berth. She removed her skirt and waist. Mr. Caminetti afterwards occupied that berth with her. I only saw him take his coat off. Mr. Diggs and I continued to occupy that lower berth that night until about half past seven or eight o'clock, I think, in the morning. The upper berth was occupied by Miss Norris and Mr. Caminetti until the same time." (Transcript of Record, pp. 249, 250.)

There was certainly nothing in this testimony justifying the prosecuting attorney in telling the jury that the defendant Caminetti requested Maury I. Diggs and Marsha Warrington to go into the lower berth or that he requested Lola Norris to get into the upper berth. Lola Norris testified, as above referred to, that she got into the upper berth "*because the couch grew uncomfortable*". And yet the trial Judge, not only permitted the prosecuting attorney to make the remarks excepted to but approved of them, stating to the prosecuting attorney: "*Proceed. That is an inference that the jury may draw from the evidence, if they see fit.*"

"It is reversible error for the prosecuting attorney in his argument to the jury to assert facts and circumstances as being in the case which are not shown by the evidence, or to comment upon such facts, or to draw inferences from them unfavorable to the accused.

Some allowance, however, is made for the extravagance or imagination of the prosecuting attorney, and *a slight* deviation from the record may be overlooked *if the accused is not prejudiced thereby.*”

Cyc., Vol. 12, p. 574, and cases there collated.

It is respectfully submitted that the “deviation from the record”, in the case at bar, was much more than “slight”; it was a marked and substantial deviation which necessarily prejudiced the defendant. It was a deliberate and wilful misstatement to the jury of an important fact which, if the jury believed the prosecuting attorney’s statement of fact, as we must assume that it did, was bound to prejudice the defendant.

Furthermore, as aptly stated by the United States Supreme Court in the case of *Hall v. U. S.*, 150 U. S. pp. 76, 82:

“The presiding judge, by declining to interpose, notwithstanding the defendant’s protest against this course of argument, *gave the jury to understand that they might properly and lawfully be influenced by it*; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitled him to a new trial. (Citing *Wilson v. United States*, 149 U. S. 60, 67, 68 (30; 650, 652).)”

Other highly improper and prejudicial remarks were as follows:

“Mr. ROCHE. The great inducement was that he (Diggs) would marry her. The child would

be a bastard unless she married Maury I. Diggs, and it did not make any difference how sensitive she might be, if that same circumstance was held out to any woman she would be willing to tear a man away from his wife if by so doing she could give a name to a child she was about to bring into the world.

MR. WOODWORTH. We except to that language upon the ground that there is no evidence that the defendant had anything to do with that at all." (Transcript of Record, pp. 89, 418, 419; Assignment of Error No. 136.)

What the liaison of Maury I. Diggs with Marsha Warrington had to do with the guilt of the defendant Caminetti, in transporting, or causing to be transported, or aiding or assisting in the transportation of *Lola Norris* (not of *Marsha Warrington*), is difficult to understand. There is not the slightest pretense that the defendant Caminetti ever had any sexual relations with Marsha Warrington. There is not a scintilla of evidence that he, in any way, was responsible or contributed to her delicate condition. Marsha Warrington testified that it was Diggs, and *not* Caminetti, who was responsible for her pregnancy. She testified as follows:

"At the time I had my first sexual intercourse with Mr. Diggs at his office, myself and Mr. Diggs were in the room by ourselves. Mr. Caminetti and Miss Norris were in another room. *I did not come out and tell Mr. Caminetti what had happened. I never told him that anything had happened.*" (Transcript of Record, p. 280.)

Under this state of the evidence, we submit that it was highly improper and most prejudicial to

the defendant for the prosecuting attorney to be permitted to refer to such an odious feature; to advert to the sexual relations existing between Diggs and Marsha Warrington, with which the defendant Caminetti had nothing whatever to do and for which he was not responsible, and to parade before the jury in lurid language the bastardy of any possible offspring as the result of the meretricious intercourse of Diggs and Marsha Warrington.

In the case of *Parker v. State*, 75 So. 437, it was held, in a prosecution for seduction, where the prosecuting attorney argued as follows:

“Miss Tedder is the mother of a three year old child. Parker is its daddy. By turning him loose she will have the care of raising and maintaining this outcast. It is your duty to protect this woman and as well see that this child has a legitimate father,”

that such remarks were reversible error on the ground that the prosecuting officer had urged improper considerations to secure a conviction.

See, on the subject generally,

People v. Hail, 19 Cal. App. Dec. 298, 309 et seq., and the cases there cited.

In the closing argument of Mr. Sullivan on behalf of the prosecution, the following highly improper comments were made with the approval and sanction of the Court:

“Mr. SULLIVAN. Now, gentlemen, we come to the other question. Now and then through the case there was a reference directly or in-

directly made to it. They were frightened. But, gentlemen, not so much frightened by reason of their relations with Lola Norris and Marsha Warrington, but they were frightened because they had *ruined other girls*.

MR. WOODWORTH. We take an exception to that.

MR. SULLIVAN. Just wait awhile. I will show you the record. I will show you the record.

THE COURT. *That is a deduction which may be drawn from the evidence which is before the jury. Counsel has a perfect right to comment upon it.*

MR. WOODWORTH. *We except.*

MR. SULLIVAN. And their conduct with other young girls was established by the Probation Officer of the Juvenile Court of Sacramento. I refer to the testimony of Mr. M. J. Sullivan, appearing on page 200.

MR. WOODWORTH. If I remember correctly, your Honor ruled out any such questions.

MR. SULLIVAN. You don't remember correctly.

MR. ROCHE. You brought it out yourself, Mr. Woodworth, we did not.

THE COURT. Gentlemen, I will ask you to desist from any such passages. *There is evidence which I have indicated which warrants such an inference.* It is of course for the jury to draw that inference, or not, as accords with their own judgment. But where there is such evidence then of course counsel are at liberty to comment upon it.

MR. WOODWORTH. *We claim there is no such evidence, and we except.*" (Transcript of Record, pp. 94, 95, 423, 424; Assignment of Error No. 146.)

* * * *

"MR. SULLIVAN. And these are the young girls unquestionably referred to by Diepenbrock in his testimony, when about the same time he

called upon Diggs and told Diggs, 'You cannot make an assignation house of my building, you had young girls in your office last night'—young girls, mind you, he did not say young ladies, but young girls.

Mr. WOODWORTH. We except to the language of counsel upon the ground that it is not based upon any evidence in this case." (Transcript of Record, pp. 95, 424; Assignment of Error No. 147.)

It is quite evident, from the language above employed by the prosecuting attorney in his closing argument, that he was endeavoring to impress the jury with the fact that the defendant Caminetti was a libertine; that he had "ruined other girls", "young girls, mind you, he did not say young ladies, but young girls". By referring to "young girls", as distinguished from "young ladies", counsel evidently treated Marsha Warrington and Lola Norris as the "young ladies", and sought to impress the jury that the defendant had "ruined *other girls*", "*young girls*".

There is not a shred of evidence in the case that the defendant Caminetti had "ruined other girls". The remarks and argument of the prosecuting attorney, in this respect, were not based upon any evidence in the case nor upon any inference or deduction which might properly and legitimately be drawn from the evidence which was before the jury. The trial Judge was in error in stating to counsel and the jury:

"That is a deduction which may be drawn from the evidence which is before the jury.

Counsel has a perfect right to comment upon it."

It is well settled law that the prosecution could not introduce in evidence the fact that the defendant Caminetti had "ruined other girls". No testimony of his misconduct with females other than the one he was accused of having transported in interstate commerce, in violation of the "White-slave traffic Act", was admissible. The same rule necessarily obtains as does in a prosecution for rape, seduction, fornication, etc. In the case of *People v. Bowen*, 49 Cal. 654, 655, the Supreme Court of the State of California held that, on a trial for an assault with intent to commit a rape, the prosecution should not be permitted to introduce in evidence the declarations of the defendant concerning his misconduct with females, other than the one he is charged with having attempted to violate. The Supreme Court said:

"At the trial, the Court allowed the prosecution, against defendant's objection, to introduce in evidence the declarations of defendant concerning his misconduct with other young girls. The attorney-general admits that this was error, and we agree with the attorney-general.

Judgment and order denying a new trial reversed, and cause remanded for a new trial."

This doctrine was reannounced in *People v. Stewart*, 85 Cal. 175, asserting the general rule that the prosecution cannot prove the commission by the defendant of other like offenses, for the purpose of increasing the likelihood that he committed the

particular offense charged. The Supreme Court said:

“The appellant relies, among other grounds for reversal, upon the alleged error of the trial Court in admitting evidence tending to show lewd, immoral, and indecent conduct of appellant with persons other than said Myrtle Collins, and tending to show lewd acts and occurrences between appellant and such other persons. The evidence of the prosecution, with the exception of the testimony of Myrtle Collins herself, consisted almost entirely of the testimony of five or six witnesses, to the effect that appellant had been guilty of lewd conduct with several other young girls, and tending to show that he endeavored to corrupt said other girls, and that he had sexual intercourse with some of them. This evidence was objected to by appellant, who took proper exceptions to its admission. The admission of this evidence was clearly reversible error. *There is no general rule more firmly settled than that the prosecution cannot prove the commission by a defendant of other offenses, for the purpose of increasing the likelihood that he committed the particular offense with which he is charged.* (People v. Lenon, 79 Cal. 628; People v. McNutt, 64 Cal. 116; People v. Barnes, 48 Cal. 551.) There is an exception to the rule which allows proof of other acts, in some exceptional cases, in order to show the *intent* with which the act charged was done; *but this exception does not apply to the case at bar.*”

In the case of People v. Elliott, 119 Cal. 593, 594, the defendant was indicted for having enticed a young unmarried girl, twelve years old, of previous chaste character, into a house of prostitution kept by the defendant, for the purpose of

prostitution, and the trial Court had admitted evidence of "other young girls" that the defendant had asked each of them to her house to have illicit intercourse with men. This was held to be error. The Supreme Court said:

"Three other young girls were called as witnesses by the prosecution, and, over the objection of defendant, were permitted to testify that defendant had asked each of them to go to her house to have illicit intercourse with men.

This character of evidence was erroneously admitted. (*People v. Stewart*, 85 Cal. 174.) While there are exceptions to the general rule excluding evidence as to other offenses, this case is not within those exceptions. *It comes squarely within the rule.*"

Authorities on this subject could be multiplied, but the general rule is so well established that we simply refer to the statement thereof set out in *Cyc.*, Vol. 12, pp. 405-412.

In the case of *People v. Crosby*, 17 Cal. App. 518, 524 et seq., it was held that it was misconduct of the district attorney to ask the prosecuting witness whether the defendant said anything to her "about putting you in a house of ill-fame in Los Angeles, as he had done with *other girls* before that", and where it was objected to both as leading and assigned as gross misconduct on the part of the district attorney, it was held that the record was inconsistent with any theory which could justify or excuse the district attorney's conduct.

The defendant was indicted and was on trial, not with "ruining young girls", but was indicted

and was then on trial for violations of the "White-slave traffic Act", an enactment relating to the interstate commerce clause of the constitution of the United States.

It is well settled that

"It is error to permit the prosecuting attorney to argue upon matters *outside of the issues in the case* and which would not be *relevant if offered in evidence.*"

Cyc., Vol. 12, p. 525, and cases there cited.

In the case of *Hall v. United States*, 150 U. S. 76, 82, the United States Supreme Court said, in reviewing objectionable remarks of a prosecuting officer made during the argument of the case to the jury:

"This whole branch of his argument was evidently calculated and intended to persuade the jury that the defendant had *murdered one man in Mississippi*, and should therefore be convicted of *murdering another man in Arkansas.*"

So in the case at bar, the prosecuting attorney was endeavoring to obtain a conviction of the defendant by arguing that the defendant must be guilty of having ruined Lola Norris because he had "ruined other girls". The language of the Supreme Court, just quoted, might well be paraphrased as follows: "This whole branch of his argument was evidently calculated and intended to persuade the jury that the defendant had '*ruined other girls*', and should therefore be convicted of *ruining Lola Norris.*"

See, also,

Williams v. United States, 168 U. S. 382; 42 L. Ed. 509.

Assuming, for the sake of argument, that it would be proper, in a case involving the violation of the "White slave traffic Act", to prove that the defendant had "ruined other girls", there is not the slightest evidence in the case at bar that he did ruin other girls, nor any evidence from which any such inference or deduction might properly and legitimately be drawn.

We refer to all of the testimony on this subject in the record. (Transcript of Record, pp. 241-242, 424.) During the examination of M. J. Sullivan, a probation officer of the County of Sacramento, he gave the following testimony:

"Q. Is it not a fact, Mr. Sullivan, that warrants were issued from your department for the apprehension of Miss Norris and Miss Marsha Warrington and Mr. Diggs and the defendant here?

Mr. ROCHE. That question is objected to upon the ground that it is uncertain as to time. We have no objection to the question being limited to any time prior to this escapade.

The COURT. Yes, if it was after that it would not be material.

Mr. WOODWORTH. The fact is that the warrants were issued after that time.

The COURT. Then it is not material.

Mr. WOODWORTH. We want to show that the inception of them, that the beginning of them, was previous to the 10th of March.

The COURT. Ask him whether any complaints were made before that date. The issuance of warrants after that date can have no bearing on the case at all.

MR. WOODWORTH. Q. So far as you know personally, Mr. Sullivan, do you know whether any complaints or reports were made to you personally with reference to the apprehension of the four persons whom I have described, which resulted subsequently in the issuance of these warrants?

MR. ROCHE. That question is objected to upon the same ground.

THE COURT. The objection is sustained.

MR. WOODWORTH. We note an exception.

THE COURT. You are not concerned, and it is improper to refer to any warrants issued afterwards, even if they were issued. There is no evidence here that they were. You can ask him if any complaints were made.

MR. WOODWORTH. Very well, your Honor.

Q. Were any complaints made to you personally with reference to these four persons, previous to the month of March, 1913?

A. *Only as to one person, Mr. Diggs; our attention was called to the fact that some girls were going into the Diepenbrock Theatre Building; and also to a man named Johnson—Johnson Whitman, and a man named O'Brien.*

That was before the 10th day of March. That was not with reference to these girls. *We have got those young ladies that they were mixed up with.* We never knew there were any such parties in existence by the name of Marsha Warrington and Lola Norris. These reports with reference to the person whom I have described as Diggs and another one as Whitman were made during the time that Mr. Diggs came to San Francisco. He was before the law here; it was in regard to the automobile. I went to his attorney, Mr. Charles B. Harris, who had returned from San Francisco, and I asked him to bring Mr. Diggs to our office, that I wished to talk to him concerning some young girls. That occurred before the 10th day of March; maybe 4 or 5 days; it was during the time

that he was in San Francisco, between that and the 10th day of March. Just about a week before.

On redirect examination, the witness, M. J. Sullivan, stated as follows:

I discovered who Mr. Whitman was. It was Mr. Caminetti, the defendant in this case. I subsequently ascertained who the girls were. They were not either Marsha Warrington or Lola Norris. One of the girls is now in the St. Catherine's Home, an institution here in San Francisco, and the other is at home with her parents." (Transcript of Record, pp. 241, 242.)

There was certainly nothing in the testimony of the above witness justifying the attorney for the prosecution in the violent inference or strained deduction that the defendant Caminetti had "ruined other girls". The witness does not even pretend to hazard such a statement. He says a complaint was made, but he does not pretend to say what the nature of that complaint was, or by whom it was made, whether by the girls themselves or by some one else, or that it was complained by anyone that the defendant Caminetti had ruined *any* girl. Whatever the complaint was, it was evidently not of sufficient gravity or seriousness to justify the issuance of any warrant against the defendant Caminetti, for the principal concern of the witness, as probation officer, seemed to be that he desired to interview Mr. Diggs. "I wished to talk to him concerning some young girls." He does not seem to have considered the complaint, if any there was against the defendant Caminetti,

of sufficient importance even to seek an interview with him. He does not testify that it was complained to him that any girls were ruined by the defendant. This witness does not pretend even to intimate that the defendant Caminetti ruined either the girl who was sent to St. Catherine's Home in San Francisco or the other one who lives with her parents. Therefore, there is nothing in the testimony of probation officer Sullivan, justifying the argument of the prosecuting attorney, in his closing address to the jury, that the defendant Caminetti had "ruined other girls", nor was the testimony given by him of such a character as to justify any fair or legitimate inference or deduction that he had "ruined other girls". The trial Judge was not justified, from this evidence, in stating to counsel in the presence of the jury: "*that is a deduction which may be drawn from the evidence which is before the jury. Counsel has a perfect right to comment upon it.*"

In view of the paucity of evidence in the case against the defendant to show that he had wilfully, unlawfully or feloniously, done anything to contribute to the transportation of Lola Norris for any immoral purpose whatsoever, it was highly improper and prejudicial for the prosecuting attorney to make the remarks he did and for the trial Judge not to check and reprove him, but, on the contrary, to approve the course and remarks made by the prosecuting attorney.

The overzealous conduct of the senior prosecuting attorney, in his closing argument to the

jury, was manifestly unfair to the defendant.

People v. Hail, 19 Cal. App. Dec. 298, 309
et seq.

See, also, cases cited on page 213 of this Opening Brief.

“It is the sworn duty of the district attorney to see that defendant shall have a fair and impartial trial, and that he shall be convicted only by competent evidence, and to secure this he should himself be fair and impartial.”

Cyc., Vol. 12, p. 571.

“It is not his duty to convict by illegitimate and unfair means, and while the Court will allow for the zeal which is the natural outcome of a legal contest, if by that zeal he is permitted to use unfair and unjust means to procure a conviction it will be reversed.”

Cyc., *supra*, citing:

People v. Lee Chuck, 78 Cal. 317; 20 Pac. 719;

State v. Irwin, (Ida., 1903) 71 Pac. 608;

People v. Carr, 64 Mich. 702; 31 N. W. 590;

People v. Dane, 59 Mich. 550; 26 N. W. 781.

See also,

People v. Derbert, 138 Cal. 467; 71 Pac. 564;

Newby v. People, 28 Colo. 16; 62 Pac. 1035;

Flint v. Commonwealth, 81 Ky. 186; 23 S. W. 346;

Leahy v. State, 31 Nebr. 566; 48 N. W. 390;

Randall v. State, 132 Ind. 539; 32 N. E. 305.

An excellent statement of the rule, relating to the conduct of prosecuting officers, is to be found

in the opinion of the Supreme Court of the State of California in the case of *People v. Lee Chuck*, 78 Cal. 317, 329, the opinion being delivered by Justice Works as follows:

“We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it.

We regret to say that the assistant district attorney seems to have failed, in this instance, to apply this salutary check to his conduct. The evidence he was seeking to have admitted was clearly incompetent. What was said was not only an argument in favor of its admission, but as to its effect. *The evident intent was to prejudice the jury against the defendant by commenting upon the conduct of others, over whose action he was not shown to have any control, and that in language the impropriety of which is apparent at a glance. The court was appealed to time and again to prevent it, but declined to do so. While we might hesitate to reverse the case on this ground alone, we*

hold it to have been error. See, as bearing on this point, *People v. Mitchell*, 62 Cal. 411, and cases cited; *State v. Smith*, 75 N. C. 306.

Questions of this kind usually arise out of the closing arguments of counsel, but the rule must be the same at whatever stage of the cause the improper language is used." (Italics ours.)

The over-nourished zeal of counsel displayed in attempts to secure conviction for crime, frequently calls for condemnation on the part of the appellate Court, especially when in the closing argument to the jury the attorney for the prosecution travels outside the evidence for his facts or indulges in truculent abuse of the accused.

Smith v. People, 8 Colo. 457;

State v. Hannett, 54 Vt. 83;

Garlitz v. State, 71 Md. 293;

Martin v. State, 63 Miss. 505; 56 Am. Rep. 813;

Perkins v. Guy, 55 Miss. 153; 30 Am. Rep. 510;

Cavanah v. State, 56 Miss. 299.

Where the remarks of the district attorney prejudiced the minds of the jury, for that reason *alone* the judgment *should be reversed*.

Brown v. Swineford, 44 Wis. 282.

It is sufficient that extra professional statements of counsel may gravely prejudice the jury and affect the verdict.

Tucker v. Henniker, 41 N. H. 317;

State v. Smith, 75 N. C. 306;

Ferguson v. State, 49 Ind. 33;
 Newton v. State, 21 Fla. 53;
 State v. Underwood, 77 N. C. 502;
 Combs v. State, 75 Ind. 221;
 People v. Barker, 42 N. Y. S. R. 940;
 People v. Ah Len, 92 Cal. 282;
 Fuller v. State, 30 Tex. App. 559.

Not only were the remarks and arguments of the prosecuting attorneys highly improper and deeply prejudicial to the defendant, constituting reversible error, but the attitude and rulings of the trial Judge, in passing upon the improper remarks and arguments of the prosecuting attorneys, were equally reprehensible and erroneous. To repeat the language employed by the Supreme Court in the case of Hall v. U. S., *supra*:

“The presiding judge, by declining to interpose, notwithstanding the defendant’s protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial. (Citing Wilson v. United States, 149 U. S. 60, 67, 68.)”

In the case of People v. Crosby, 17 Cal. App. 518, 526, the following language, apposite to the case at bar, was used:

“It appears, therefore, that the misconduct of the district attorney was accompanied by error of the trial court, resulting in the sustaining of the district attorney in the act consti-

tuting the misconduct. When the attention of the court was directed to the act of the district attorney and the same assigned as misconduct, *it was the duty of the court to reprimand the district attorney, and admonish the jury to disregard the statement of the district attorney and the matters suggested by the question; thus, if possible, destroying the baneful effect thereof.* (Citing *People v. Bradbury*, 151 Cal. 678 (91 Pac. 497; *People v. Derwae*, 155 Cal. 592 (102 Pac. 466.)”

As was well said by the Court of Appeals for New York, in the case of *People v. Becker*, 104 N. E. 396, 402, 403:

“While the Courts are, as they should be, ready to make due allowance for some inadvertent slip made by zealous counsel in the heat and struggle of a bitterly contested trial, that consideration, of course, does not apply to the presiding judge, and no case will be found where there has been overlooked the failure or refusal of the trial Court in a desperate case like this to correct and check such important and repeated errors as these were. (Citing *People v. Fielding*, 158 N. Y. 542, 53 N. E. 497, 46 L. R. A. 641, 70 Am. St. Rep. 495; *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592; *People v. Conrow*, 200 N. Y. 356, 369, 93 N. E. 943.)”

Much that is said in the *Becker* case is applicable to the remarks and arguments of the prosecuting attorneys in the case at bar.

It is respectfully submitted that, upon the grounds alone of misconduct on the part of the prosecuting attorneys and of the trial Judge, urged in this subdivision of our Opening Brief, the defendant is clearly entitled to a reversal and new trial.

VII.

The Trial Court Erred In Refusing to Give the Several Instructions Requested on Behalf of the Defendant, Advising the Jury That Mere Presence by the Defendant Caminetti, Without any Act of Participation on His Part, Did Not Constitute the Commission of any Offense so far as He was Concerned.

The requested instructions, which the Court below refused to give, and to which timely exceptions were taken and assignments of errors now urged, are as follows:

“The Court erred in refusing to give to the jury instruction No. 99 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

I further instruct you that the mere fact that the defendant was present, if you believe it to be a fact that he was present, at the time of the offenses charged to have been committed by Maury I. Diggs, would not be sufficient to warrant his conviction, or to justify you in finding him guilty. You must be satisfied, beyond a reasonable doubt, that he was not only present, but that he aided, abetted, counseled, commanded, induced, or procured a commission of the offense charged to have been committed by Maury I. Diggs, and if, from the evidence, you are not thus satisfied beyond all reasonable doubt and to a moral certainty that the defendant, although present, at the commission of the alleged offenses by Maury I. Diggs, aided, or abetted, or counseled, or induced, or procured the commission of the offenses charged by the government to have been committed by Maury I. Diggs, then it is your duty to acquit the defendant.” (Tran-

script of Record, pp. 112, 446, 461, 462; Assignment of Error. No. 184.)

McCoy v. State, 40 Fla. 494; 20 So. 485;
Jackson v. State, 20 Tex. 192.

“The Court erred in refusing to give to the jury instruction No. 100 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

I further instruct you that the mere fact that the defendant was present, if you believe it to be a fact that he was present, at the time the offenses were charged to have been committed by Maury I. Diggs, would not be sufficient to warrant his conviction or to justify you in finding him guilty.” (Transcript of Record, pp. 113, 446, 462; Assignment of Error No. 185.)

McCoy v. State, 40 Fla. 494; 20 So. 485;
Evans v. State, 109 Ala. 11; 19 So. 535;
State v. Vaughn, 200 Mo. 1; 98 S. W. 2;
State v. Fox, 70 N. J. L. 353.

“The Court erred in refusing to give to the jury instruction No. 107, requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are further instructed that, in the first count of the indictment, the defendant is charged with having wilfully, knowingly and feloniously unlawfully transported and caused to be transported, and aided and assisted in obtaining transportation for, and in transporting in interstate commerce from Sacramento in the State and Northern District of California, to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific, a certain girl, to wit, one Lola Norris, for the purpose of

debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and mistress of the said defendant.

You are instructed, under the first count of the indictment, that before you will be authorized or justified in convicting the defendant, you must first be satisfied to your entire satisfaction and beyond all reasonable doubt that the defendant did some act of a material, substantial character by virtue of which the said Lola Norris was transported or caused to be transported, or aided or assisted in obtaining transportation for, and in transporting her in interstate commerce. And in this connection, I charge you that the act of transportation, or of causing to be transported or aiding or assisting in obtaining transportation, must have been some such act as that which led to the purchase of tickets, or furnishing the means with which to purchase tickets, or some such act resulting in the transportation, and unless you are satisfied to a moral certainty and beyond all reasonable doubt that the defendant did commit some substantial material act resulting in the transportation of Lola Norris for the purpose alleged in the indictment and with the intent denounced by the law and alleged in the indictment, it will be your sworn duty to acquit him" (Transcript of Record, pp. 115, 446, 464; Assignment of Error No. 189.)

"The Court erred in refusing to give the jury instruction No. 109 requested by defendant, which instruction was in the words and figures following, to wit:

You are further instructed that it is not sufficient for the prosecution to show to your entire satisfaction and beyond all reasonable doubt, that the defendant was present, if you should find that he was present, at the time that the tickets were purchased by Maury I. Diggs, or

that he knew that said tickets had been purchased by Maury I. Diggs, but it is incumbent on the prosecution to prove to your entire satisfaction and beyond all reasonable doubt that the defendant not only was present at the time the tickets were purchased by Maury I. Diggs and that he knew the purpose for which the tickets were purchased by said Maury I. Diggs, but it must prove, as alleged in the first and second counts of said indictment, that said defendant did some act of a material, substantial nature in transporting or causing to be transported, or in aiding or assisting in obtaining transportation for Lola Norris and Marsha Warrington, or either of them, in interstate commerce for the specific purpose of debauchery and for the immoral purpose alleged in the indictment, and unless you shall so find beyond all reasonable doubt, it will be your duty to acquit the defendant." (Transcript of Record, pp. 116, 446, 465; Assignment of Error No. 190.)

State v. Molloy, 44 Ia. 104;

Ward v. Com., 77 Ky. 233.

"The Court erred in refusing to give to the jury instruction No. 111 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

You are further instructed that the mere presence or the mere knowledge of the defendant of the commission of the offenses claimed by the prosecution to have been committed by Maury I. Diggs, and with which this defendant is also charged in a separate indictment, is not sufficient to warrant his conviction or to justify you in finding him guilty.

You must be satisfied, beyond all reasonable doubt, not only that he was present or had knowledge of the commission of the offenses claimed by the prosecution to have been com-

mitted by Maury I. Diggs, but you must be further satisfied, beyond all reasonable doubt, that he then and there knew that the specific intent and purpose of said Maury I. Diggs in committing the offenses claimed by the prosecution to have been committed by said Maury I. Diggs was the specific purpose and intent denounced by the White Slave Traffic Act, to wit, for the purpose of debauchery and for an immoral purpose as alleged in the indictment.

Moreover, you must further be satisfied, beyond all reasonable doubt, not only that the defendant had the knowledge of the intent and purpose of said Maury I. Diggs in committing offenses claimed by the prosecution to have been committed by said Maury I. Diggs and in which it is claimed by the prosecution the defendant wilfully and knowingly participated. but you must further be satisfied, beyond all reasonable doubt, that the defendant, having such knowledge, just referred to, did aid, or abet, or counsel, or command, or induce, or procure the commission of the offenses claimed by the prosecution to have been committed by said Maury I. Diggs, and if you have any reasonable doubt as to any of the matters just referred to, it is your sworn duty to give the defendant the benefit of that doubt and acquit him." (Transcript of Record, pp. 117, 446, 466, 467; Assignment of Error No. 192.)

State v. Gatlin, 170 Nev. 354; 70 S. W. 885;

Burrell v. State, 18 Tex. 713;

McCoy v. State, 40 Fla. 494.

"The Court erred in refusing to give to the jury instruction No. 114 requested on behalf of defendant, which instruction was in the words and figures following, to wit:

I further instruct you that you are not to permit yourselves to be influenced by the fact

that Maury I. Diggs, the defendant in another case, may or may not be guilty under the indictment and proofs presented in the case against him, but you are to try this defendant and to base your verdict, if satisfied of his guilt to a moral certainty and beyond a reasonable doubt, solely and exclusively and entirely upon the indictment in this case and upon the testimony, proofs and evidence in this case and in this case alone." (Transcript of Record, pp. 119, 446, 468; Assignment of Error No. 195.)

McCoy v. State, 40 Fla. 494.

We respectfully insist that the requested instructions, or at least some of them, should have been given by the trial judge. They should have been given, in view of the very meagre evidence contained in the record. While the distinction between a principal and an accessory has been abolished by federal statute, as well as by the laws of the State of California, still, in view of the extreme paucity of the evidence, upon which the prosecuting attorneys sought to convict the defendant Caminetti on the first count of the indictment, the jury should have been fully advised as to what acts or conduct on the part of the defendant Caminetti constituted him such a participant in the commission of the alleged offense in count one of the indictment as to constitute him a principal. It is most significant, as showing the extreme paucity of the evidence, that the defendant was acquitted on the other three counts of the indictment.

Section 332 of the Criminal Code of the United States provides:

“Whoever directly commits any act constituting any offense defined in any law of the United States, or aids, or abets, counsels, commands, induces, or procures its commission, is a principal.”

Section 971 of the Penal Code of the State of California contains a substantially similar provision.

Inasmuch as it affirmatively appears in evidence that defendant Caminetti did not buy the ticket, with which Lola Norris traveled in interstate commerce between Sacramento to Reno, and that he did not furnish the money with which the ticket was purchased; that he did not purchase the Pullman ticket for Lola Norris nor did he furnish the money with which the same was purchased; that there is no competent or legal evidence that he ever had any understanding or agreement with Diggs to reimburse the latter; that the latter's act in furnishing the transportation was purely voluntary and gratuitous on his part; that the defendant committed no act, directly or indirectly, contributing to the transportation, or causing the transportation, or aiding or assisting in the transportation of Lola Norris, in interstate commerce from Sacramento to Reno, we respectfully contend that the jury should have been fully instructed and advised as to just what acts would constitute the defendant Caminetti a principal.

Confessedly, mere presence at the commission of an offense or mere knowledge that an offense is about to be committed, without any participation in

the same, does not render one amenable to the law either as a principal or an accessory.

“To render one guilty as an accessory before the fact he must have participated in or instigated the crime. Bare concealment of the fact that a felony is about to be committed, or failure to endeavor to prevent it, is not enough.”

Cyc., vol. 12, p. 191, and cases there cited.

It appears affirmatively in evidence that the first discussion, when the subject of leaving Sacramento was brought up, took place between Maury I. Diggs and Marsha Warrington, at which neither the defendant Caminetti nor Lola Norris were present, and was occasioned chiefly because of the unfortunate delicate condition in which Miss Warrington found herself as the result of her indiscretions with Diggs, and not with the defendant Caminetti (Transcript of Record, pp. 261, 262, 280). The latter certainly could not be said to have aided, or abetted, or counseled, or induced, or had any guilty connection with that matter.

It also affirmatively appears in evidence that he was not present at the *decisive* interview between Maury I. Diggs and Marsha Warrington and Lola Norris, held on Sunday, March 9, 1913, at the Plaza in Sacramento, at which Lola Norris and Marsha Warrington made up their minds to leave Sacramento (Transcript of Record, p. 264). The defendant Caminetti certainly could not be said to have aided, or abetted, or counseled, or induced, or had any guilty connection with that feature of the case.

While it may be true that he was present at and took part in other previous interviews, yet it must be remembered that at those previous interviews the young women positively declined to leave Sacramento; but, at the decisive interview or conference held at the Plaza, on March 9, 1913, at which the defendant Caminetti was not present, it was then that the young women, after listening to the statements of Diggs, resolved to leave Sacramento.

At the most, his only participancy with the transportation, or causing to be transported, or aiding, or assisting, in the transportation of Lola Norris, in interstate commerce, from Sacramento to Reno, of which he was convicted on the first count of the indictment, seems to have been in his accompanying Maury I. Diggs, Marsha Warrington and Lola Norris on the trip from Sacramento to Reno. Outside of his mere presence and going with them, he did nothing except to "just stand around" (Transcript of Record, p. 249) with them and to agree to everything that they did. He was no more active in the actual furnishing of transportation than Marsha Warrington or Lola Norris.

We respectfully submit that, under the meagre evidence adduced against the defendant Caminetti, as to what he actually did, to support the charge upon which he was convicted on the first count of the indictment, the trial Judge should have given at least some of the instructions requested on behalf of the defendant and set forth above.

In this connection, we also urge the trial Judge committed reversible error in instructing the jury as follows:

“As to the question, which has been argued by counsel, whether the evidence is sufficient to show that the defendant transported or aided or assisted in transporting these girls to Reno, you will understand that it is not necessary to sustain this charge that the defendant be shown to have himself paid for the tickets or other expenses of that trip. If he contributed to the means for paying such expenses, or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs, this would be sufficient upon which to sustain the charge that the defendant aided and assisted in such transportation.” (Transcript of Record, pp. 128, 441, 445; Assignment of Error No. 208.)

There was no sufficient evidence to justify such an instruction; there was no sufficient legal evidence that there was an understanding between the defendant Caminetti and Diggs that the defendant Caminetti was thereafter to contribute thereto by reimbursing Diggs. Such an instruction, under the state of the evidence, was unjustified and erroneous.

In a previous portion of this Opening Brief (Subdv. V. thereof; pp. 170-206) we alluded to the only testimony in the record (of Marsha Warrington and of Lola Norris) on this subject, and there pointed out that this testimony is totally insufficient, both in fact and law, to sustain a judgment of conviction. We contended that either the motion to acquit should have been granted or the motion for judgment of acquittal should have been granted on the first count of the indictment, and

have been granted or, thereafter, certainly the motion in arrest of judgment.

All that Marsha Warrington testified on the subject of any reimbursement by the defendant to Diggs for Diggs' purchase of the railroad ticket for Lola Norris was:

“The way I UNDERSTOOD IT Mr. Diggs was to spend his money and then when he ran short then Mr. Caminetti was to spend his money.” (Transcript of Record, pp. 248, 266, 267.)

As we pointed out, in the previous portion of this Opening Brief, the “understanding” of Marsha Warrington cannot be dignified by the name of evidence, especially in a criminal case involving the liberty of the accused. Again, as a matter of law, we directed the attention of this Appellate Tribunal to the proposition that Marsha Warrington was an accomplice of the defendant and that the only corroboration of her “understanding” was the testimony of Lola Norris, another accomplice, and we referred to the well established rule of law that one accomplice cannot corroborate another accomplice.

Cyc., Vol. 12, pp. 458, 459, and cases there cited.

We also referred to the testimony of Lola Norris, who testified:

“Mr. Caminetti and Mr. Diggs *were* to share the expenses.” (Transcript of Record, p. 303.)

We also showed the unreliability of this testimony of Lola Norris, and adverted to the fact that she

also was an accomplice and was corroborated, if corroborated at all, only by another accomplice, Marsha Warrington.

Without elaborating further on this branch of the argument, we respectfully submit that there was no sufficient legal evidence to justify the trial Judge in instructing the jury as he did, in reference to any understanding that he had with Diggs, that he was thereafter to contribute to the furnishing of the transportation by Diggs by reimbursing Diggs, and that this instruction was erroneous, unjustified and constitutes reversible error.

As was well said by the Supreme Court of the State of California in the case of *People v. Keefer*, 65 Cal. 232:

“However incredible the testimony of defendant, he was undoubtedly entitled to an instruction based upon the hypothesis that his testimony was entirely true.”

So, in the case at bar, the defendant was entitled to some of the instructions requested by him upon the theory that his testimony was entirely true and that he did not “participate in or instigate the crime.”

VIII.

The Trial Court Erred In Refusing to Give Instruction No. 116 Requested on Behalf of Defendant, Which Instruction Was as Follows:

“You are hereby further instructed that in every offense amounting to felony there must be a joint union of act and intent. And in this connection I further instruct you that the mere fact that the defendant may have given \$20 to Lola Norris to buy her own ticket or to buy the ticket of Marsha Warrington or both to Reno, and that neither one or both actually did purchase a ticket, is not of itself sufficient to constitute an act or offense within the meaning of the White Slave Traffic Act. It must further appear and to your satisfaction beyond a reasonable doubt that the \$20 or some portion thereof was actually used by Lola Norris or Marsha Warrington in the purchase of a railroad ticket to Reno as charged in the indictment, and if it does not so appear to your satisfaction and beyond a reasonable doubt it will be your duty not to consider the mere giving of the \$20 by the defendant, if you believe such to be the fact, to Miss Lola Norris for the purpose of purchasing her ticket or that of Miss Warrington’s, as any offense within the meaning of the ‘White Slave Traffic Act.’ ”
(Transcript of Record, pp. 121, 469; Assignment of Error No. 197.)

By all means, this instruction should have been given. As heretofore stated in this Opening Brief, it appeared affirmatively and without contradiction that the \$20, which the defendant Caminetti gave to Lola Norris, was never used by her to purchase any ticket for herself or Marsha Warrington, but, on

the contrary, was returned to the defendant Caminetti. The money, with which the tickets were purchased, came from and was paid by Maury I. Diggs.

Under this state of facts, the cautionary instruction requested should have been given, so as to prevent confusion in the minds of the jurors. Especially should this instruction have been given, in view of the charge to the jury actually given by the trial Judge that:

“You will understand that it is not necessary to sustain this charge that the defendant be shown to have himself paid for the tickets or other expenses of that trip. If he contributed to the means for paying such expenses, *or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs, this would be sufficient upon which to sustain the charge that the defendant aided and assisted in such transportation.*” (Transcript of Record, pp. 128, 441, 445; Assignment of Error No. 208.)

The jury should have been warned that the mere giving of the \$20 by the defendant Caminetti to Lola Norris should not be considered by them, in view of the fact that it affirmatively appeared from the testimony of Lola Norris herself, and also of Marsha Warrington, that the \$20 was never used by Lola Norris to buy any railroad transportation whatever and that the money was afterwards returned to the defendant Caminetti and some disposition made of it other than for transportation purposes in interstate commerce. The jury may well

have considered, for aught that appears and in view of the instructions actually given by the trial Judge, that the mere giving of \$20 by the defendant Caminetti to Lola Norris for the purpose of buying a ticket was sufficient to justify a verdict of conviction on the first count of the indictment, even though the money was never actually used for that purpose and was in fact actually returned to the defendant Caminetti.

Furthermore, the refusal of the Court to instruct the jury as requested failed to take into account the *locus poenitentiae* which existed from the time the defendant Caminetti gave Lola Norris the \$20 for the purchase of her ticket until the *time of the actual purchase* of the ticket. As we have seen, Lola Norris never used any portion of the money to purchase any tickets for herself or anyone else. We, therefore, respectfully submit that the above instruction should have been given.

IX.

The Trial Court Erred in Refusing to Give the Following Instruction Requested on Behalf of Defendant:

“In considering the testimony of the witness, Lola Norris, and determining the credibility to be attached thereto, and the weight to be given her evidence, you may consider her motive in testifying, whether or not she has been, or appears to be acting under the influence of any person or persons, whether or not any promise of immunity has been offered to her, and any hope she may have for leniency in any criminal action brought against herself.” (Transcript of Record, pp. 98, 449; Assignment of Error No. 154.)

Cochrane v. State, 113 Ga. 726.

Not only did the trial Judge refuse to instruct the jury that Lola Norris was an accomplice of the defendant Caminetti, but he refused to give the cautionary instruction above requested. He did this, in face of the fact that it affirmatively appeared in evidence that the witness Lola Norris was under arrest and then out on bail in the sum of \$1000 on warrants issued by the state authorities in Sacramento for her complicity in leaving Sacramento with the defendant Caminetti and going with him to Reno, Nevada. (See Transcript of Record, pp. 326, 327, 328.)

Lola Norris testified as follows:

“While I was in Reno and after I came back to Sacramento *I had friendly feelings toward Mr. Caminetti* for a while. *I don't know what you mean by friendly now.* When I went to Reno I had *an affection for him.* *I do not feel*

*that same disposition toward him at this time. I take the Sacramento papers. I saw quite a number of items about Mr. McNab. I don't remember that one in particular to the effect that Mr. McNab, the United States Attorney, had received information that the girls and the parents objected to prosecuting the men under the 'White Slave Act', that McNab was going to get their statements and in case the girls did not testify he had provided himself with detention warrants. I don't remember seeing in the papers notice to the effect that unless we girls were willing witnesses that we ourselves would be arrested and prosecuted. I think I saw something like that in the 'Bee', substantially to the effect that if the girls do not tell the story he will have them arrested and detained as witnesses, and he says he thinks that the young women will consider it advisable to tell the truth. We take the 'Bee' at home. I remember the last part of an article on March 25th, saying in substance and effect—purporting to be a letter from Mr. McNab, that his idea was that what should be done with myself and Miss Warrington would be influenced somewhat by our evidence and good faith in testifying in the case, and that he may be able to learn in a few days how willing we are to testify. Mr. McNab came to see me in Sacramento. * * * My father and mother and myself discussed these newspaper articles. I believe there was some charges filed against us when we were at Reno but that was, as I understand it, merely to compel us to come back to Sacramento. It was thought there that Mr. Diggs and Mr. Caminetti would not allow us to return, and charges were filed for that reason, as I understand it. I don't know very much about it, but I believe there is such a warrant; Probation Officer Sullivan swore out complaints against Marsha Warrington and myself*

on March 15th, after we came back from Sacramento and that we are out on \$1000 bail, and the complaints are still pending.’’

A reading of the above testimony will readily disclose the propriety of having instructed the jury as requested on behalf of the defendant. The credibility of Lola Norris, the weight to be given her evidence, her motives in testifying, whether or not she had been, or appeared to be, acting under the influence of anyone in giving her testimony, whether or not any promise of immunity had been offered to her, or any hope held out to her that she might have leniency in any criminal proceeding against her; all these matters were for the jury to pass upon in determining what weight and credibility to attach to her testimony. .

X.

The Trial Court Erred In Failing to Give the Following Instructions, Requested on Behalf of Defendant:

"You are further instructed that circumstances of suspicion, no matter how grave or strong, are not proof of guilt, and the accused must be found not guilty unless the fact of his guilt is proven beyond every reasonable doubt to the actual exclusion of every reasonable hypothesis of his innocence consistent with the facts proven." (Transcript of Record, pp. 96, 446, 447; Assignment of Error No. 149.)

Longley v. Com., 99 Va. 807; 37 S. E. 339;

People v. Roberts, 1 Cal. App. 447.

"The Court instructs you that in civil cases, if there be conflicting evidence, the duty of the jury is to weigh it, and render a verdict according to its preponderance; but in criminal cases, the guilt of the accused must be fully proven, and it is not sufficient that the weight of the evidence points to his guilt." (Transcript of Record, pp. 108, 446, 458; Assignment of Error, No. 176.)

Longley v. Com., 99 Va. 807; 37 S. E. 339;

Bones v. State, 117 Ala. 138; 23 So. 138.

These instructions should have been given, in view of the very meagre, if not entire absence of evidence, disclosed by the record against the defendant.

Furthermore, the difference between the amount of proof required in a criminal case and a civil suit should have been explained to the jury. Especially so, where, as in the federal Courts, jurors are required to try both criminal and civil cases during the term of their jury service.

XI:

The Trial Court Erred In Failing to Give the Following Instructions Requested on Behalf of Defendant as to Circumstantial Evidence:

“You are hereby further instructed that insofar as the prosecution relies upon circumstantial evidence to establish the guilt of the defendant, to authorize a conviction on circumstantial evidence, ‘each of the circumstances should not only be consistent with the defendant’s guilt, but they must be inconsistent with any other rational conclusion or reasonable hypothesis, and such as to leave no reasonable doubt.’” (Transcript of Record, pp. 97, 446, 448; Assignment of Error No. 151.)

People v. Nelson, 85 Cal. 421;

State v. Lucas, 97 N. W. 1007.

“I further instruct you that to warrant a conviction on circumstantial evidence ‘each fact in any chain of facts from which the defendant’s guilt is to be inferred must be proved by the same weight, degree and the force of the evidence as if it were the main fact of the defendant’s guilt itself. All of such facts must be consistent, each with all of the others, and with the defendant’s guilt, and all, taken together, must be so strong as to exclude, to a moral certainty, every reasonable hypothesis but that of the defendant’s guilt.’” (Transcript of Record, pp. 97, 98, 446, 448, 449; Assignment of Error No. 152.)

People v. Anthony, 56 Cal. 600;

People v. Ah Ching, 54 Cal. 402;

State v. Gatlin, 170 Mo. 354; 70 S. W. 885.

“The jury are instructed that in order to convict the defendant upon circumstantial evi-

dence, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other reasonable conclusion. It is not sufficient that the circumstances proven coincide with, account for, and render probable the hypothesis sought to be established by the prosecution, but they must exclude, to a moral certainty, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty." (Transcript of Record, pp. 98, 446, 449; Assignment of Error No. 153.)

Longley v. Com., 99 Va. 807; 37 S. E. 339;

Benton v. State, 78 Ark. 284.

The above instructions were all taken from approved authorities and should have been given.

The prosecution relied, for a verdict of guilty on the first count of the indictment, upon circumstantial as well as direct evidence. The prosecuting attorneys adverted to the circumstantial evidence time and again in their opening and closing arguments to the jury. The jury should have been instructed very fully upon the law of circumstantial evidence. The trial Judge, outside of a short instruction to the effect that each link in a chain of circumstantial evidence must be supported by the same degree of proof (Transcript of Record, p. 433), only gave to the jury the following brief instruction:

"And where circumstantial evidence is relied upon in whole or in part for a conviction, such circumstances should not only be in harmony with the guilt of the accused, but they must be such that they cannot reasonably be true in the ordinary course of things and the defendant

be innocent." (Transcript of Record, pp. 433, 434.)

In view of the wide range which the trial Judge permitted in the introduction of the evidence, treating the prosecution as akin to one for conspiracy, the above instruction was entirely too limited, to be of any effective assistance to the jury. The question of the intent and purpose of the defendant in going with Lola Norris from Sacramento to Reno was one of the principal points, if not the principal point, for the jury to pass upon in arriving at the defendant's guilt or innocence. This was largely, if not entirely, a question of circumstantial evidence. The trial Judge did not hesitate to instruct the jury as follows:

"The intent or purpose with which a given act is committed, however, need not be shown by any open declaration of the party charged that such was his intent. It may be adduced from the *circumstances shown in the evidence*, including all the acts done or statements made by the defendant, either orally or in writing, and by the acts and declarations in his presence of those, if any, concerned with him in carrying out the transaction. In other words, it is to be gathered by the jury from those sources by applying their reason and judgment to the evidence and making the deduction therefrom which men of ordinary experience and observation in the affairs of life would naturally draw. When the intent is thus made manifest, and the jury are able to so find, it satisfies the law and is sufficient, if the other elements are shown, to sustain guilt. *Of course it is an inference or deduction but it is a very usual and proper one. Indeed if such were not*

the law it would be rare that the specific intent of a defendant in doing a particular act could be established. Men, committing a wrongful act, do not ordinarily proclaim in any open, definite manner the real purpose or intent with which the act is done, and therefore unless it could be inferred from the circumstances surrounding it, the real intent could in most instances not be established." (Transcript of Record, pp. 431, 432.)

In view of the above charge to the jury, the trial Judge should also have given the instructions on circumstantial evidence requested on behalf of the defendant. If the learned trial Judge attributed so much importance to the circumstances in evidence tending to show the intent and purpose of the defendant, he should certainly have given the instructions on the weight, scope and proper limitation of circumstantial evidence in determining guilt, requested by counsel for the defendant. In refusing to do so, we respectfully submit that he committed serious error.

XII.

The Trial Court Erred In Refusing to Give the Following Instructions Requested on Behalf of Defendant:

“You are hereby further instructed that the specific intent denounced by the statute, known as the White Slave Traffic Act, and alleged in the indictment must have existed at Sacramento, State and Northern District of California, the place where the offences are alleged to have been committed, or at least within the State and Northern District of California, and must have existed at the time the alleged violations of the statute in question are charged to have been committed, and if it should appear from the evidence that the specific intent and purpose denounced by the White Slave Traffic Act and alleged in the indictment was not formed and did not exist until after the parties transported had passed the boundary line dividing California from Nevada, then it is your duty to acquit this defendant, as the intent must have existed at the time of the commission of the acts complained of, which are charged in the indictment to have been committed in Sacramento, State and Northern District of California.” (Transcript of Record, pp. 120, 444, 446, 468; Assignment of Error No. 196.)

Campbell v. State, 35 Ohio St. 70.

“The Court instructs you that it is not a crime under the laws of the United States for the defendant to have performed the acts set forth in the indictment, if the same were wholly committed in the State of California, nor would the same be a crime by the laws of the United States, under the allegations of the indictment, unless the defendant used a common carrier engaged in business of transporting and carrying passengers in interstate commerce for the purpose that Lola Norris should become

the concubine and mistress of the defendant. If you do not find from all the evidence that the defendant used a common carrier engaged in the business of transporting and carrying passengers in interstate commerce for the purpose that Lola Norris should become the concubine and mistress of the defendant, it will be your duty to find the defendant not guilty." (Transcript of Record, pp. 111, 460, 446; Assignment of Error No. 181.)

Both of these instructions should most certainly have been given. The locus, where the specific intent denounced by the "White Slave Traffic Act" was first formed, was one of the pivotal points in the case. The prosecution stoutly maintained that the illegal intent and purpose had been formed by the defendant before passing the boundary line dividing Nevada from California. The defense as vigorously contended, in the first place, that no illegal intent and purpose, that is, the illegal intent and purpose denounced by the "White Slave Traffic Act", was formed at all; and, in the second place, if any such intent and purpose were formed, that it was not formed within the State and Northern District of California; that no intent and purpose was formed until after the defendant and Lola Norris had passed the state line and had almost arrived at Reno. The importance of this point, in determining the guilt or innocence of the defendant, cannot be overestimated. It was the crux of the whole case. The defense contended, and introduced evidence in support thereof, that the purpose and intent in leaving Sacramento was to escape

impending notoriety, scandal and disgrace, bodily harm and probable arrest, and that it was not for the purpose alleged in the first count of the indictment and denounced by the "White Slave Traffic Act", to wit:

"that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant." (Transcript of Record, p. 2.)

The defense contended, and the evidence on that point is uncontradicted and irrefutable, that what the defendant and Lola Norris were to do or how they were to live upon reaching Reno was not considered by them or even discussed until they were almost on the verge of reaching Reno. This is the incontestable evidence in the case. This feature has already been adverted to in a previous portion of this Opening Brief, under the fifth subdivision thereof, in which we urge that a reversal should follow because of the refusal of the trial Judge to instruct the jury to acquit, or in refusing to grant the motion in arrest of judgment, upon the ground that there was no evidence sufficient to justify submitting the case to the jury or to sustain the judgment of conviction. (See pages 170-206 of this Opening Brief.)

The intent of the defendant was the vital point in the case. The *time of the formation of this intent* was equally important. This is clearly illustrated by the following heated passage between the prosecuting attorneys and counsel for the defendant.

During Mr. Roche's opening argument to the jury, the following occurred:

"MR. ROCHE. They agreed *before they left the confines of the State of California and before the train reached Reno*, that they would take assumed names and would hire a bungalow at Reno.

MR. ANTHONY CAMINETTI. That is not the testimony, may it please the Court. You will find the testimony on pages 222-225 of the record. *That was after they crossed the state line.*

MR. ROCHE. I repeat it again, so there will not be any question of your understanding as to what I mean: *Before these parties reached the state line, and before the train passed from the confines of the State of California into the State of Nevada* these two men then agreed to take fictitious names, and that these two men *at that time* made up their minds that just as soon as that train reached Reno they would hire a bungalow in which the four of them were to live. Counsel in his statement virtually admitted that and he said that what happened at Reno was merely incidental and accidental.

MR. WOODWORTH. I did not say that, Mr. Roche. I said they had determined to leave Sacramento and that what happened after they got to Reno was accidental and incidental.

THE COURT. This jury is a jury of intelligent men. If counsel misstate the evidence to them in any wrong way they will be able to determine that. I would not interrupt. Counsel is entitled to a legitimate limit within which to give his views of the evidence.

MR. WOODWORTH. But he is not entitled to misquote counsel. I said what happened after they arrived at Reno was accidental and incidental.

The COURT. Counsel is characterizing it. I have never observed that these interruptions of this character, unless it is of a very flagrant kind, accomplished anything except simply delay.

Mr. ROCHE. That fact has been established by the government, gentlemen of the jury, although the defendant did not undertake to enlighten you on that matter himself.

Mr. WOODWORTH. We except to that again.” (Transcript of Record, pp. 416-417.)

In that connection, we again refer to the testimony of M. L. Jones, the conductor upon the Southern Pacific Company’s train that transported Lola Norris and the defendant Caminetti from Sacramento to Reno, who testified:

“I recall that the train reached Reno on the morning of the 10th at 11-47. * * * The train passed over the state line about 10-40 or a little later probably.” (Transcript of Record, p. 158.)

Miss Warrington testified:

“I recall the time the train reached Reno. Before the train reached Reno and during sometime that morning, Mr. Diggs and Mr. Caminetti discussed the question of renting a house of some sort. *Mr. Diggs and Mr. Caminetti, Miss Norris and myself were to live in this house. That discussion took place just before we got to Reno. Possibly half an hour before.* After alighting from the train at Reno we went to—I don’t know where it was, and had lunch. I think it was the Thomas Grill. The four of us had lunch. *The train reached Reno around noon I think.*” (Transcript of Record, p. 250.)

Miss Norris testified:

“There was a conversation before we reached Reno, as to what names should be assumed by Diggs and Caminetti. They discussed different names that they might use and finally decided on Ross and Enright.” (Transcript of Record, p. 273.)

Miss Norris further testified:

“Mr. Diggs did not say to me *at any time*, that he wanted me to go over there for the purpose of living with him.” (Transcript of Record, p. 270.)

She further testified:

“*Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by anybody.*” (Transcript of Record, pp. 309, 310.)

Under this state of the evidence, the first discussion as to what was to be done and how they were to live after reaching Reno took place about 11 o'clock that morning, or fully one half an hour after the train had passed over the state line. The train reached Reno on the morning of March 10th, 1913, at 11-47. It passed over the state line “about

10-40 or a little later probably". Miss Warrington recalled the time that the train reached Reno, "around noon." She swears that:

"That discussion took place *just before* we got to Reno. *Possibly half an hour before.*"
(Transcript of Record, p. 250.)

In view of this uncontradicted evidence, coming from the lips of the witnesses for the prosecution themselves, the trial Judge should have granted the motion to instruct the jury to acquit. He should have granted the motion in arrest of judgment. *At the very least*, he should not have refused to give the above instructions requested on behalf of the defendant.

We respectfully submit that a mere reading of the record in the case discloses that the above instructions, requested by counsel for defendant, should have been given by the trial Judge. Inasmuch as the act of transportation, of which the defendant was accused and convicted, is a continuous offense, it may well be that the jury considered that the intent or purpose could be formed at any time while the defendant was on the train and previous to reaching Reno even though the state line had been passed and the defendant and Lola Norris had passed beyond the jurisdiction of the State and Northern District of California. The trial Judge should have given the above instructions, under the evidence adduced in the case, and his refusal to do so constitutes serious error.

XIII.

The Trial Court Erred In Refusing to Give at Least Some of the Several Instructions Requested on Behalf of the Defendant Relating to the Question of the Specific Intent Denounced by the "White-slave Traffic Act".

All of these requested instructions may be considered together. We state, frankly, that we did not expect the trial Court to give all of the instructions requested on the subject of the intent and purpose of the defendant, but we do contend, with all deference to the learned trial Judge, that some of these instructions, at least, should have been given.

As previously stated, the question of the intent and purpose of the defendant in leaving Sacramento with Lola Norris was one of the, if not the most, important and vital points in the case, which were submitted to the jury in determining the defendant's guilt or innocence. The jury should have had the benefit of any instructions which would have assisted it in arriving at an intelligent and just conclusion with respect to the intent and purpose of the defendant.

It was the contention of the government that the intent and purpose of the defendant in leaving Sacramento with Lola Norris was

"that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant." (See Indictment, Transcript of Record, p. 2.)

It was the contention of the defendant that he left Sacramento with Lola Norris for *no such purpose*; that he would have left Sacramento, as disclosed by the testimony, even though Lola Norris had not accompanied him (Transcript of Record, p. 407); that the defendant testified, without contradiction: “ ‘Then I am gone.’ I meant that when Mr. Diggs got there to have me arrested that I would not be there, that I was going to get out of town”; that the intent and purpose of his leaving Sacramento, as well as that of Lola Norris, was to avoid the impending notoriety, scandal and disgrace that both expected would fall upon them should they remain in Sacramento, because of their indiscretions (Transcript of Record, p. 318); that he feared the wrath of Maury I. Diggs’ father, who blamed the defendant for the wayward conduct of his son; that he was fearful of the steps that Maury I. Diggs’ wife might take against him, as she also blamed him for her husband’s neglect and escapades; that he was worried as to what course his own wife might take against him, in the way of a divorce or in appealing to the Juvenile Court at Sacramento; that he feared, on account of the anger and resentment of Maury I. Diggs’ father, that he might lose his position with the Board of Control at Sacramento, as the latter had threatened to report him and have him discharged as not being a fit person to be employed by the state government; that he was apprehensive of arrest by the juvenile authorities in Sacramento because of his association with Lola Norris, then just under the

age of 21 years; that for all of these reasons and others appearing in evidence he left Sacramento to avoid trouble, disgrace, personal harm and impending arrest and did *not* leave with the then purpose and intent of cohabiting with Lola Norris as his concubine or mistress as charged in the indictment. (Transcript of Record, pp. 402-407.)

All these matters were placed in evidence and testified to, not only by Marsha Warrington and Lola Norris, but by I. P. Diggs, the father of Maury I. Diggs; by Lina Diggs, the wife of Maury I. Diggs; by Elizabeth Caminetti, the wife of the defendant; by T. H. Warrington, the father of Marsha Warrington; by M. J. Sullivan, a probation officer of the County of Sacramento; by W. E. Norris, the father of Lola Norris; by J. A. Putnam, editor of the sporting columns of the Sacramento "Bee"; by D. T. Leitch, C. L. Avery, P. J. O'Brien and by M. H. Diepenbrock, all residents of Sacramento.

Lola Norris testified, on cross-examination, as follows:

"Q. Was it not your idea and the idea of everybody to get out of Sacramento, to get out of town, and to escape the notoriety and disgrace?

The COURT. Q. Was it to get out of Sacramento or to get out of the state?

A. We didn't want to get out of the state, we thought if we could possibly stay there and avoid it we were willing to do that and face any disgrace that might come up; I don't remember that anything was said about getting

out of the state. *The idea was to avoid any notoriety or scandal that might arise.*" (Transcript of Record, p. 318.)

Marsha Warrington testified:

"Mr. Diggs did not say to me *at any time*, that he wanted me to go over there for the purpose of living with him." (Transcript of Record, p. 270.)

Lola Norris further testified:

"Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. *Never by anybody.*" (Transcript of Record, pp. 309-310.)

It would prolong to unwarranted limit this already too lengthy brief, even to give an epitome of the testimony of each one of the above witnesses, but a reading of the evidence contained in the Transcript of Record will disclose the facts just as we have stated them. The intent and purpose of the defendant in leaving Sacramento and going to Reno was to avoid trouble, notoriety, scandal,

disgrace, bodily harm, and, as he feared, to escape arrest by the state authorities in Sacramento. The intent and purpose of Lola Norris in leaving Sacramento and accompanying the defendant was substantially the same. This intent and purpose was, obviously, totally inconsistent with the intent and purpose denounced by the "White Slave Traffic Act" and charged in the indictment. After arriving at Reno, *after crossing the state line*, whatever was done by the defendant and Lola Norris of an immoral nature was a matter of afterthought and subsequent arrangement and had nothing to do with the *original intent and purpose of the defendant and of Lola Norris in leaving Sacramento*. Under this view of the case and in consideration of the contention of the defendant, made clear repeatedly to the trial Judge from the examination of the witnesses by his attorneys, and their statements to the Court and their arguments to the jury, we respectfully submit that at least some of the subjoined instructions should have been given by the trial Judge.

We append all of the requested instructions on this subject, which were refused by the trial Court:

"The Court instructs you that in every case where a specific intent is necessary in order to constitute a particular crime, the burden of proving such specific intent is upon the prosecution; and unless they prove that specific intent or state of mind to your satisfaction beyond all reasonable doubt, it is your duty to acquit." (Transcript of Record, pp. 101, 446, 452; Assignment of Error No. 161.)

“The Court instructs the jury that where a defendant is charged with the violation of a statute which expressly requires, in order to render an act punishable, that it should be done with a specific intent or purpose or state of mind, if from ignorance of law; or from any other reason that specific intent does not exist; there is lacking one of the elements of the crime, and if you find from the evidence in this case that through ignorance of the law the defendant did not have that specific intent and state of mind charged in the indictment, it is your duty to acquit him regardless of how you view his conduct otherwise.” (Transcript of Record, pp. 102, 446, 452; Assignment of Error No. 162.)

“The Court instructs you that the mere taking away or transporting, or purchasing tickets for transportation or transporting, or inducing or enticing a female to go to a state other than the State of California is not in itself a crime unless these acts are done with the specific intent and purpose alleged in the indictment.” (Transcript of Record, pp. 102, 446, 452; Assignment of Error No. 163.)

People v. Black, 147 Cal. 426.

“You are instructed that when one is said to have taken away a female for the purpose of concubinage, that means in law that the party charged with such taking away purposed or meant to create a sort of marriage relation between himself and the female; that he purposed to co-habit with her, and to have continual intercourse with her, and if you find from the evidence that this was not his purpose, or if not convinced beyond all reasonable doubt that such was his purpose, it is your duty to find him not guilty.” (Transcript of Error, pp. 103, 446, 453; Assignment of Error No. 164.)

“Before you can convict the defendant of the crime charged in the indictment, you must find that at the time he did the acts alleged in said indictment, if you find beyond all reasonable doubt that he did, that there existed in his mind the purpose and intent that the said Lola Norris should become the mistress and concubine of said defendant; in other words, you must find beyond all reasonable doubt not merely the purpose of having sexual intercourse with her, but the purpose of creating the relation between himself and the said Lola Norris, of concubinage, which is a natural marriage, as contradistinguished from a legal or civil marriage, and for the purpose of having an habitual and continued illicit cohabitation with her, and unless you find such purpose and intent actually existing in his mind at the time of the alleged commission of the acts alleged in the indictment, you must find a verdict of acquittal.” (Transcript of Record, pp. 103, 446, 453; Assignment of Error No. 165.)

“In determining whether or not at the time of the alleged commission of the offense charged in the indictment, the defendant had the specific state of mind charged, you may consider all the evidence relating to such acts and relations of the parties, and, if after a full and careful consideration of all the evidence, you are not satisfied beyond all reasonable doubt that the state of mind alleged in the indictment actually existed, but believe that defendant’s acts were actuated by motives other than that alleged it is your duty to find him not guilty.” (Transcript of Record, pp. 105, 446, 454, 455; Assignment of Error No. 168.)

“If you find from the evidence in this case that the main purpose and intent of defendant in taking the said Lola Norris from the State of California into the State of Nevada, if you find beyond all reasonable doubt that he did

so take her, was fear of publicity or disgrace or fear of arrest, and that he took her from the state to avoid public disgrace or for any other reason than that charged in the indictment, you cannot convict the defendant as to that charge, but must acquit him." (Transcript of Record, pp. 105, 446, 455; Assignment of Error No. 169.)

"You are instructed that the indictment in this case charges in the first count, that the defendant transported and caused to be transported to Reno, in the State of Nevada, one Lola Norris, 'for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be, and become the concubine and mistress of said defendant.' In order to convict the defendant upon this count of said indictment it is essential that the prosecution prove beyond all reasonable doubt, not only that the said Lola Norris was transported, but that said transportation was done for the purpose alleged in said indictment, and that such intent or purpose existed in the mind of the defendant at the time of such transportation. And, if you find that the prosecution has failed to prove such purpose to your satisfaction beyond all reasonable doubt, it is your duty to find him not guilty upon this count of said indictment even though you may be satisfied that he had immoral relations with the said Lola Norris, after such transportation had been accomplished." (Transcript of Record, pp. 105, 106, 446, 455, 456; Assignment of Error No. 170.)

People v. Black, 147 Cal. 426.

"Evidence has been introduced tending to show that the purpose of defendant in going from Sacramento to Reno in company of Lola Norris was to avoid notoriety that the defendant expected would result in the publication in

a newspaper of certain facts of a scandalous nature. You have the right to consider such evidence as tending to show the intent and purpose of the defendant. If it satisfies your mind that the purpose of the defendant of the alleged transportation of Lola Norris was not that charged in the indictment, it will be your duty to return a verdict of not guilty." (Transcript of Record, pp. 109, 110, 446, 459; Assignment of Error No. 178.)

"The Court instructs the jury that the indictment charges that the purpose of the alleged transportation of Lola Norris from Sacramento to Reno was that she should become the mistress and concubine of the defendant. It is claimed on the part of the defense that such was not the purpose, and evidence has been introduced tending to show that reports had been made to defendant that certain facts were to be made public in Sacramento and that for the purpose of escaping the notoriety that would follow publicity, the defendant intended to leave Sacramento, for a brief period, and that it was no part of his purpose to have Lola Norris as his concubine and mistress. If you believe that the purpose of the defendant was not as charged in the indictment, it will be your duty to bring a verdict of not guilty." (Transcript of Record, pp. 110, 446, 459; Assignment of Error No. 179.)

"The Court instructs the jury that it is one of the material facts for the prosecution to prove and establish to your satisfaction beyond a reasonable doubt the guilty intention of the defendant, and such intent must be established to your satisfaction beyond a reasonable doubt like any other facts required to be proven in the case. Such intent may be proven by circumstances or by the direct testimony of the witnesses, but unless it is proven to your satisfaction beyond a reasonable doubt that the

acts charged in the indictment were done for the purpose and with the intent charged in the indictment, it will be your duty to return a verdict of not guilty.” (Transcript of Record, pp. 111, 446, 460; Assignment of Error No. 180.)

“The court instructs the jury that although the defendant took Lola Norris from Sacramento to Reno and had sexual intercourse with her, the defendant cannot be convicted unless the jury finds also that the purpose of the defendant in leaving Sacramento was to have sexual intercourse with her or to make her his mistress and concubine as charged in the indictment. If the jury find that such was not his purpose, or have a reasonable doubt that such was his purpose, you will return a verdict of not guilty.” (Transcript of Record, pp. 111-112, 446, 461; Assignment of Error No. 182.)

“You are further instructed that the mere fact that the evidence may show or tend to show, if you believe it to be a fact, that the defendant and Lola Norris may have had sexual relations after their arrival at Reno, Nevada, is not of itself sufficient to justify or authorize you to convict the defendant on the first count of the indictment, but you must also be further satisfied to your entire satisfaction and beyond all reasonable doubt that the defendant wilfully, knowingly, and feloniously, unlawfully transported and caused to be transported, and aided and assisted in obtaining transportation for and in transporting in interstate commerce the said Lola Norris, and that he then and there had the purpose in mind of debauchery and for an immoral purpose, to wit: that the said Lola Norris should be and become the concubine and mistress of the defendant.

The intent and purpose of the defendant at the time of the act of transportation alleged against him is the *very gist and question* in the case and unless this intent and purpose is proved to your satisfaction beyond all reasonable doubt, it will be your sworn duty to acquit the defendant even though you may be satisfied that the defendant and Lola Norris may have had sexual relations after their arrival at Reno, State of Nevada.” (Transcript of Record, pp. 114-115, 446, 463; Assignment of Error No. 188.)

Athanasaw v. United States, 227 U. S. 326.

“You are hereby further instructed that if you are satisfied from all of the evidence presented in the case that the intent and purpose of the defendant in going from Sacramento to Reno was to avoid scandal and notoriety and was not for the purpose alleged in the four counts of the indictment namely, a purpose of debauchery and for an immoral purpose in that Lola Norris and Marsha Warrington should become the concubines and mistresses of the defendant and Maury I. Diggs respectively, or if you have a reasonable doubt, after considering all the evidence in the case, as to the real purpose and intent of the defendant in going from Sacramento to Reno, or as to the real purpose and intent of the defendant, in doing any of the acts charged against him in the indictment then it is your sworn duty to acquit the defendant.” (Transcript of Record, pp. 117, 446, 465, 466; Assignment of Error No. 191.)

In order to determine whether the trial Judge should have given any of the instructions above requested, it is important to ascertain just what the trial Judge did instruct the jury on the sub-

ject of the specific intent and purpose denounced by the "White Slave Traffic Act". We set this out in full.

The learned trial Judge charged the jury as follows:

"You will observe that in each count of the indictment the specific purpose and intent of the defendant in committing the particular criminal act therein charged is alleged. The existence of this intent at the time of committing any of the acts charged is made essential under the statute to constitute an offense, that is, that the act be committed to accomplish the immoral purpose denounced, since there must exist a union of act and intent. It is therefore essential to the guilt of the defendant under any one of these counts that you find the existence of this intent at the *initiation of any such act*. That is one of the substantive elements necessary to constitute a violation of the law in question. The intent need not, however, be formed for any fixed period of time before the act is committed. *It is sufficient if it co-exists with the commission of the act*. The intent or purpose with which a given act is committed, however, need not be shown by any open declaration of the party charged that such was his intent. It may be deduced from the circumstances shown in the evidence, including all the acts done or statements made by the defendant, either orally or in writing, and by the acts and declarations in his presence of those, if any, concerned with him in carrying out the transaction. In other words, it is to be gathered by the jury from those sources by applying their reason and judgment to the evidence and making the deduction therefrom which men of ordinary experience and observation in the affairs of life would naturally draw.

When the intent is thus made manifest, and the jury are able to so find, it satisfies the law and is sufficient, if the other elements are shown, to sustain guilt. Of course it is an inference or deduction but it is a very usual and proper one. Indeed if such were not the law it would be rare that the specific intent of a defendant in doing a particular act could be established. Men, committing a wrongful act, do not ordinarily proclaim in any open, definite manner the real purpose of intent with which the act is done, and therefore unless it could be inferred from the circumstances surrounding it, the real intent could in most instances not be established." (Transcript of Record, pp. 431, 432.)

The trial Judge further instructed the jury, on the question of intent and purpose, in the following language:

"As has been stated to you by defendant's counsel in their argument, one of the most material facts left in this case for your determination in reaching a verdict is as to the purpose or intent with which these girls were transported to Reno on the occasion in question, should you find that they were so transported. Upon this question the defendant has introduced the evidence of several witnesses, and has himself testified to facts tending to show certain threats emanating from the father of Maury I. Diggs, and the wife of the latter, and others, and communicated to himself, and his companion Diggs, from which it is claimed that their sole actuating motive on leaving Sacramento was to escape arrest and exposure and possible personal violence at the hands of the father of one of the girls. This evidence is all

before you for your consideration in connection with the other evidence in the case bearing upon that subject. *The defendant, however, in his testimony, did not in any express or direct way touch upon the Reno trip, or specifically state what his purpose or intent was in taking these girls, or either of them, with him, if you find they were so taken; nor has he testified as to what the facts or incidents of that trip were,—confining himself to a statement of certain things occurring before that trip was taken, and their effect upon his state of mind. Now it was the defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, as has been stated to you by counsel for the government, to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from the fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but where a defendant elects to go upon the stand and testify, he then subjects himself to the same rule that applies to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusions as to his guilt or innocence.*

“If, therefore, you find that these girls were transported to Reno by the defendant and his

companion Diggs, in the manner claimed by the prosecution, and the evidence in behalf of the defendant as to the motive or intent with which such transportation was had is not such as appeals to your hard, practical reason and common sense, in the light of all the other evidence and when all the acts of the defendant are considered, *you are not compelled to believe it.* As aptly suggested by one of the defendant's counsel in his argument, there is a homely adage that actions speak louder than words; and the truth of this is quite as pertinent in its application to judicial inquiries as in the ordinary affairs of life. *If, therefore, you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Diggs cohabited with them in the manner stated, then you may find that they were taken there with such purpose and intent. That is, if the evidence on behalf of the defendant as to his actuating motive in taking these girls with him on that occasion does not accord with his acts, you may discard that evidence if it does not carry conviction to your minds and base your findings as to his intent upon the acts committed by him.*

And even should you find that the defendant and his companion Diggs were actuated in their departure or flight from Sacramento by fear of exposure or arrest, but that nevertheless in taking these two girls with them there existed the intention to subject them to the immoral purpose charged, then you will be justified in finding the defendant guilty. If that immoral purpose was one motive inducing him to take these girls with him, it would matter not that he may also have been actuated by his fears or other consideration moving him to take that trip; he would nevertheless be guilty." (Transcript of Record, pp. 439, 440, 441.)

The first criticism, that we have to offer to the instructions to the jury as given by the trial Judge, is that he did not give sufficient prominence to the element of "reasonable doubt". We repeatedly took exceptions to the charge as given on that ground. (See Transcript of Record, pp. 444, 445, 446; Assignments of Errors Nos. 201, 202, 203, 204, 205, 206, 207.)

The instructions requested by us, which were refused, made it very clear to the jury that the question of specific intent and purpose was one of the most material ingredients of the offenses charged and that the government was bound to prove the specific intent and purpose of the defendant *beyond "reasonable doubt"*.

Nor did the trial Judge give sufficient prominence, in his charge to the jury, to the various features revolving around the main contention of the defendant, to wit: that he left Sacramento to escape impending notoriety, scandal, disgrace and probable arrest as well as fear of bodily harm.

With all due deference to the learned Judge, we incline to the opinion that this portion of the charge, as to the intent and purpose of the defendant, was much too favorable to the government and did not do the defendant full and impartial justice. The trial Judge should have given at least some of the instructions requested by the defendant as to his intent and purpose in leaving Sacramento. The jury should have been fully advised as to the

various features of this all-important question in the case. It is to be observed that the trial Judge gave great prominence to the relations existing between the defendant Caminetti and Lola Norris after their arrival at Reno and during their temporary sojourn of three days in the bungalow at Reno. He said, among other things:

“If, therefore, you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Diggs cohabited with them in the manner stated, *then you may find that they were taken there with such purpose and intent. That is, if the evidence on behalf of the defendant as to his actuating motive in taking these girls with him on that occasion does not accord with his acts, you may discard that evidence if it does not carry conviction to your minds and base your finding as to his intent upon the acts committed by him.*” (Transcript of Record, pp. 440, 441.)

This charge to the jury was certainly prejudicial to the defendant. The trial Judge could have modified his remarks, and placed before the jury the question of intent and purpose more fully and fairly to the defendant by also giving some of the instructions which were refused.

Furthermore, the charge as given was radically erroneous, as already pointed out in subdivision III of this Opening Brief, in instructing the jury, after some slight reference to the evidence on behalf of the defendant tending to show threats emanating from the father of Maury I. Diggs, etc., etc., that:

“This evidence is all before you for your consideration in connection with the other evidence in the case bearing upon that subject. *The defendant, however, in his testimony, did not in any express or direct way touch upon the Reno trip, or specifically state what his purpose or intent was in taking these girls, or either of them, with him, if you find they were so taken; nor has he testified as to what the facts or incidents of that trip were,—confining himself to a statement of certain things occurring before that trip was taken, and their effect upon his state of mind.* Now it was the defendant’s privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, as has been stated to you by counsel for the government, *to take this omission of the defendant into consideration.*

“A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from the fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but where a defendant elects to go upon the stand and testify, he then subjects himself to the same rule that applies to any other witness, *and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusions as to his guilt or innocence.*” (Transcript of Record, pp. 439, 440.)

It is difficult to escape the conclusion that the effect of the trial Judge's charge to the jury, especially on the question of the intent and purpose of the defendant in leaving Sacramento, was to belittle and disparage the defense. This would have been obviated, to some extent at least, had the learned trial Judge given some of the instructions requested by the defendant. The evidence presented in the case, both on behalf of the prosecution and the defendant, justifies us in claiming that the trial Judge committed reversible error in refusing to give at least some of the instructions requested on behalf of the defendant on the all-important question of the intent and purpose of the defendant in leaving Sacramento.

XIV.

The Only Issue Involved in the Indictment Escaped the Attention of the Trial Court. This Issue was Also the Only Issue in the Evidence. The Whole Charge of the Trial Court to the Jury was, for This Reason, Misleading and Erroneous and the Jury Was Blinded as to the Real Issue. By Reason of This, Therefore, Defendant Failed to Receive a Fair and Impartial Trial.

(Transcript of Record, pp. 101, 102, 103, 104, 105, 106, 109, 110, 111, 112, 446, 451-461; Assignments of Error Nos. 160, 164, 165, 166, 167, 170, 178, 179, 180, 183.)

The whole charge to the jury is pregnant with the above misconception indulged in by the trial Court.

The Court labored under the impression that the defendant was charged with the interstate transportation of the women for the purpose of "*debauchery*." The prosecution also misconceived the nature of the issue.

The indictment charges that the defendant transported Lola Norris over the lines of the Southern Pacific Railway, etc., with the intent and purpose that she should "be and become the *concubine* and the *mistress* of the said defendant". The indictment expressly limits the immoral purpose to that of becoming the *mistress* of the defendant. (Transcript of Record, p. 2.)

That, and that only, is the crime charged against this defendant in the indictment.

The trial Court and the prosecution labored under the impression that the crime charged was the interstate "*debauchery*" of the woman. The terms "*debauchery*" and "other immoral purpose" (practice) used in the indictment are general terms. But the indictment specifically *limits* the meaning of the general words and charges a *limited* offense. The general words are limited and controlled by the specific words following them—"to wit, that the aforesaid Lola Norris should be and become the *concubine* and the *mistress* of the said defendant."

It is elementary that, where the words of the statute are general, it is necessary to particularize in the indictment.

Mr. Justice Field, in *United States v. Hess*, 124 U. S. 483; 31 L. ed. 516, said:

"The statute upon which the indictment is founded only describes the general nature of the offence prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offence, states no matters upon which issue could be formed for submission to a jury."

To the same effect, see:

Keck v. U. S., 172 U. S. 434; 43 L. ed. 505;

Evans v. U. S., 153 U. S. 584, 587;

U. S. v. Britton, 107 U. S. 655, 661;

U. S. v. Carll, 105 U. S. 611, 612;

U. S. v. Mann, 95 U. S. 580, 585.

As stated, the terms "debauchery" and "other immoral purposes" (practices), used in the statute, are general terms.

The word "debauchery", in the statute, means carnal knowledge, sexual intercourse of a girl or woman.

State v. Reeves, 97 Mo. 668; 10 S. W. 841;
10 Am. St. Rep. 349.

As was well said by this appellate tribunal, in the very recent case of *Suslak v. United States*, 213 Fed. 913, 917:

"Moreover, the denunciation of the law is not against transportation for the purpose of *debauchment*, but for the purposes of *debauchery*. In the Century Dictionary *debauchery* is defined as:

"'Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust.'

"So Webster, while giving, as one of the meanings, seduction from virtue, duty, or allegiance, also defines the term as:

"'Excessive indulgence of the appetites, especially excessive indulgence of lust; intemperance; sensuality; habitual lewdness.'

"It was in this sense of unlawful indulgence of lust in which the term was intended to be used in the act."

Athanasaw v. U. S., 227 U. S. 326; 57 L. ed. 528.

The uses to which a girl or woman could be subjected by a white slaver, so as to make such female a *debauchee*, and her master a criminal under the Act, are numerous. He could be a pan-

derer for other men. He could compel her to submit to an animal,—a dog, or to a man, in a licentious exhibition, to which admission is charged. These are common practices in large cities, especially in Europe.

Lewd exhibitions, in which she could be compelled to expose herself—her naked body—or practice immoral parts, not amounting to debauchery, would come within the term “other immoral purpose” (“other immoral practices”). Under this, would come public masturbation and other practices too vulgar to mention. Also, she could be compelled to use her mouth with men—a practice common in Europe, and especially in France.

These are but a few illustrations of practices to which white women and girls are today being subjected by white slavers. It was for the purpose of reaching this class of human beasts that the Act was passed.

See:

“The Battle With the Slums,” pp. 69-75, by Jacob A. Riis, N. Y. The MacMillan Company, 1902.

Therefore, in order to allege facts in an indictment under this statute, “upon which issue could be formed for submission to a jury”, it becomes necessary to particularize. The framer of the indictment in the case at bar did so.

The issue in the case at bar was: Did the defendant transport Lola Norris to "be and become the *concubine* and the *mistress* of the defendant"?

In the first portion of its charge to the jury, the trial Court goes at length into the statute. The language, used to inform the jury of the law covering the case and by which they shall be governed, is couched in the general expressions contained in the statute. (Transcript of Record, pp. 425-431.) *They are not in any manner qualified or limited to cover or explain the issue involved.* Then, later, where the Court defines and charges the jury upon the criminal intent (Transcript of Record, pp. 431-432), the same general language is used.

The framer of the indictment recognized the rule and alleged the facts which constituted the criminal act; but nowhere did the trial Judge charge the jury on the real issue involved. To be sure, the Judge defined the terms "concubine" and "mistress", but never once did he inform the jury that the defendant was charged with transporting the women for the purpose of making them such. On the other hand, the Court expressly led the jury to believe that the defendant was charged with merely seducing the woman, and that, if they so found, they were bound to find the defendant guilty as charged. Our contention is borne out by a reference to the definition given by the trial Court, with painstaking particularity, to the term "debauchery". (Transcript of Record, pp. 429, 430.)

The defendant, as we heretofore stated, was *not charged* with "debauchery", but this definition, given with such minute particularity, and in words, which seemingly covered the defendant's relation with the woman covering a period long prior to the trip to Reno, could not effect a result on the jury other than we maintain.

On page 440 of the Transcript of Record, the trial Court goes even farther and practically withdraws the issue from the consideration of the jury in these words:

"There is a homely adage that actions speak louder than words; and the truth of this is quite as pertinent in its application to judicial inquiries as in the ordinary affairs of life. If, therefore, you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Diggs cohabited with them in the manner stated, then you may find that they were taken there with such purpose and intent. That is, if the evidence on behalf of the defendant as to his actuating motive in taking these girls with him on that occasion does not accord with his acts, you may discard that evidence if it does not carry conviction to your minds and base your finding as to his intent upon the acts committed by him."

The whole charge of the Court in the case at bar is on a parity with the charge reviewed by the Supreme Court in the Hickory case. (Hickory v. U. S., 160 U. S. 408, 421-422; 40 L. ed. 474.)

Mr. Justice White, on page 422, in part says:

“The instruction as to the probative weight which the jury should attach to the fact of flight was equally erroneous. It was as follows: ‘And not only this, but the law recognizes another proposition as true, and it is that “the wicked flee when no man pursueth, but the innocent are as bold as a lion.” That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply to this case.’ This instruction was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive that it was the duty of the jury to act on it as an axiomatic truth. On this subject also it is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have, that is, as creating a legal presumption so well settled as to amount virtually to a conclusive proof of guilt.”

From the portion of the charge quoted above, it is most certain that the real issue in the case at bar was lost to the trial Judge. There was no issue in the evidence as to the sexual relations; there was even no issue as to the co-habitation; but there was issue joined—and it was the only issue in the case—upon the allegation “for the purpose

* * * that the aforesaid Lola Norris should be and become the *concubine* and the *mistress* of the said defendant."

We respectfully submit that a man may seduce a woman, and yet that woman, as a matter of law, may not be either his *mistress* or his *concubine*. We also respectfully submit that a man may "co-habit" with a woman not his wife, and still, as a matter of law, that woman might not be his *concubine* or his *mistress*.

But the lower Court assumed, as a matter of law, that if the jury should find that the defendant Caminetti co-habited with—slept with—or seduced—the woman, that in any such event he was guilty as charged.

We respectfully submit that this portion of the charge invaded the province of the jury. That it took away from the consideration of the jury the only issue in the case and left that body with nothing to do but return a verdict of guilty.

Instructions, legally correct in themselves as independent propositions, or as applied to an appropriate state of facts, are erroneous if applied to a state of facts to which they are not adapted.

Pond v. Williams, 1 Gray 630, 636;

Wright v. Old Colony & Fall River Railroad Co., 9 Gray 413;

Brightman v. Eddy, 97 Mass. 478.

They tend to mislead the jury either into the supposition that a proper state of facts exists to which

the propositions are to be applied by them, or into drawing the suggested inference from facts which do not authorize it.

Commonwealth v. Maloney, 113 Mass. 211.

The trial Judge should have given our requested instructions numbered 38, 45, 46, 47, 48, 54, 92, 93, 94 and 98. (Transcript of Record, pp. 101, 102, 103, 104, 105, 106, 109, 110, 111, 112, 446, 451, 453, 454, 455, 456, 459, 460, 461; Assignments of Error Nos. 160, 164, 165, 166, 167, 170, 178, 179, 180, 183.)

The defendant was entitled to have the only issue alleged in the indictment and raised by the evidence submitted to the jury. He was entitled to have it clearly stated to the jury that he was not on trial for general immorality or for any other conduct of a reprehensible nature; that he was not on trial for having co-habited with—slept with—or seduced—Lola Norris; but that he was charged *only* and on trial *upon the single issue* that it was his intent and purpose: “That the aforesaid Lola Norris should be and become the *concubine* and the *mistress* of the said defendant.” (Transcript of Record, p. 2.)

The trial Court gave to the words “concubine” and “mistress”, contained in the above averment in the indictment, “too wide a meaning”.

In the case of *Suslak v. United States*, *supra*, this appellate tribunal, in passing upon an instruction by the trial Court dealing with the words “unlawful cohabitation”, which was the immoral purpose alleged in the indictment in that case, said:

“On the other hand, we think that the trial court gave to ‘unlawful co-habitation’ too wide a meaning. It is to be noted that this phrase is not used in the White Slave Act at all. The act denounces transportation for the purpose of prostitution or debauchery, ‘or for any other immoral purpose’; and the one count in the indictment upon which this question arises charges transportation ‘for an immoral purpose, to wit, for the purpose of unlawful co-habitation’. It is a question, therefore, not of the construction of the language of the act, but of the proper interpretation or construction of the indictment. The pleader might have selected any appropriate language to describe the species of immorality intended to be charged, and, having chosen a *legal phrase* for the purpose, *it is to be presumed that it was employed in its legal sense*. In that view, the first part of the instruction is free from serious objection, but it is inaccurate to say that it would be unlawful co-habitation if a man and a woman, being unmarried, simply ‘intended to live together’ as man and wife, or if the man, having another room, intended repeatedly to visit at the woman’s room for the purpose of sexual intercourse. Such intention must be put into actual practice; there must be an actual living together. While it may be true that joint occupancy of the same room is not under all circumstances essential, still it is clear that where the man and woman do not dwell in the same house, and the visitation for sexual intercourse is clandestine, and there is no other association together after the manner of husband and wife, the relation, however immoral and unlawful, does not constitute unlawful co-habitation. (Citing Anderson’s Dictionary of Law; Words and Phrases, vol. 8, p. 7188; Cannon v. United States, 116 U. S. 55, 6 Sup. Ct. 278, 29 L. Ed. 561; Turney v. State, 60 Ark. 259, 29 S. W. 893.)”

Furthermore, under the peculiar circumstances of the case at bar, the jury should have been clearly instructed that the fact that the defendant may have been guilty of some offense, or general immoral conduct, other than that charged in the indictment and denounced by the "White-slave traffic Act", should not influence their judgments in considering his guilt or innocence on the charges upon which he was being tried.

What was said by the Court of Appeals of New York, in the now celebrated case of *People v. Becker*, 104 N. E. Rep. 396, 400, is peculiarly pertinent to the case at bar:

"Of course, if this judgment of conviction is to be affirmed, it must be done because the defendant is guilty of murder and *not because he was guilty of 'grafting' or official misconduct, however iniquitous and despicable they may have been.*"

So, in the case at bar, however reprehensible may have been the conduct of the defendant, as disclosed by the record, the jury should have been told that he could be convicted only because he was guilty of a violation of the "White-slave traffic Act", and not because of any general immoral conduct or of his guilt of some offense other than a violation of the "White-slave traffic Act".

Had the indictment, in the case at bar, been more general in its averment of the intent and purpose of the defendant, it may well be that the learned Judge of the Court below would have been

justified in refusing to give the instructions requested by us, but, in view of the limitation which the prosecutor saw fit to allege in the indictment, he was bound thereby, and the jury should have been clearly instructed to that effect, and it was reversible error for the trial Judge to refuse the instructions requested by us on this phase of the case.

The requested instructions, which were refused, are as follows:

“You are instructed that the defendant is on trial for the crime charged in the indictment in this case and for no other crime. The law in its wisdom does not undertake to regulate the moral conduct of its subjects, unless the same is declared to be criminal, and even if you find the defendant’s conduct has been very reprehensible morally, still, if you are not convinced of his guilt beyond all reasonable doubt of the crime charged in the indictment, you should find the defendant not guilty, no matter what your opinion may be of his conduct otherwise.” (Transcript of Record, pp. 101, 446, 451; Assignment of Error No. 160.)

Stuart v. People, 73 Ill. 20.

“You are instructed that when one is said to have taken away a female for the purpose of concubinage, that means in law that the party charged with such taking away purposed or meant to create a sort of marriage relation between himself and the female; that he purposed to co-habit with her; and to have continual intercourse with her, and if you find from the evidence that this was not his purpose, or if not convinced beyond all reasonable doubt that such was his purpose, it is your

duty to find him not guilty.” (Transcript of Record, pp. 102, 103, 446, 453; Assignment of Error No. 164.)

“Before you can convict the defendant of the crime charged in the indictment, you must find that at the time he did the acts alleged in said indictment, if you find beyond all reasonable doubt that he did, that there existed in his mind the purpose and intent that the said Lola Norris should become the mistress and concubine of said defendant; in other words, you must find beyond all reasonable doubt not merely the purpose of having sexual intercourse with her, but the purpose of creating the relation between himself and the said Lola Norris, of concubinage, which is a natural marriage, as contradistinguished from a legal or civil marriage, and for the purpose of having an habitual and continued illicit cohabitation with her, and unless you find such purpose and intent actually existing in his mind at the time of the alleged commission of the acts alleged in the indictment, you must find a verdict of acquittal.” (Transcript of Record, pp. 103, 446, 453; Assignment of Error No. 165.)

“You are instructed that one, two, or even half a dozen acts of illicit intercourse would not of themselves constitute concubinage, but there must exist a purpose and intent to have an habitual and continued illicit cohabitation with the woman in question, and you must believe beyond a reasonable doubt, before you can convict the defendant under this indictment, that his purpose was that the said Lola Norris should be and become his concubine and mistress, and that his purpose was not merely to have illicit sexual intercourse with her; for if his purpose was merely to gratify his desires by rape, seduction or fornication, he would not be guilty under this indictment, and you must

acquit him.” (Transcript of Record, pp. 104, 446, 454; Assignment of Error No. 166.)

“You are further instructed that defendant is charged with the crime alleged in the indictment in this case, and no other offense. The burden of proving every material allegation of this indictment is upon the prosecution and if they fail to so prove to your satisfaction beyond all reasonable doubt, it is your duty to acquit, even though you may be satisfied the defendant is guilty of some crime other than that charged.” (Transcript of Record, pp. 104, 446, 454; Assignment of Error No. 167.)

“You are instructed that the indictment in this case charges in the first count, that the defendant transported and caused to be transported to Reno, in the State of Nevada, one Lola Norris, ‘for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be, and become the concubine and mistress of said defendant.’ In order to convict the defendant upon this count of said indictment it is essential that the prosecution prove beyond all reasonable doubt, not only that the said Lola Norris was transported, but that said transportation was done for the purpose alleged in said indictment, and that such intent or purpose existed in the mind of the defendant at the time of such transportation. And, if you find that the prosecution has failed to prove such purpose to your satisfaction beyond all reasonable doubt, it is your duty to find him not guilty upon this count of said indictment even though you may be satisfied that he had immoral relations with the said Lola Norris after such transportation had been accomplished.” (Transcript of Record, pp. 106, 446, 455, 456; Assignment of Error No. 170.)

“Evidence has been introduced tending to show that the purpose of defendant in going from Sacramento to Reno in company of Lola Norris was to avoid notoriety that the defendant expected would result in the publication in a newspaper of certain facts of a scandalous nature. You have the right to consider such evidence as tending to show the intent and purpose of the defendant. If it satisfies your mind that the purpose of the defendant of the alleged transportation of Lola Norris was not that charged in the indictment, it will be your duty to return a verdict of not guilty.” (Transcript of Record, pp. 109, 110, 446, 459; Assignment of Error No. 178.)

“The Court instructs the jury that the indictment charges that the purpose of the alleged transportation of Lola Norris from Sacramento to Reno was that she should become the mistress and concubine of defendant. It is claimed on the part of the defense that such was not the purpose, and evidence has been introduced tending to show that reports had been made to defendant that certain facts were to be made public in Sacramento, and that for the purpose of escaping the notoriety that would follow publicity, the defendant intended to leave Sacramento for a brief period, and that it was no part of his purpose to have Lola Norris as his concubine and mistress. If you believe that the purpose of the defendant was not as charged in the indictment, it will be your duty to bring in a verdict of not guilty.” (Transcript of Record, pp. 110, 446, 459; Assignment of Error No. 179.)

“The Court instructs the jury that is one of the material facts for the prosecution to prove and establish to your satisfaction beyond a reasonable doubt the guilty intention of the defendant, and such intent must be established

to your satisfaction beyond a reasonable doubt like any other facts required to be proven in the case. Such intent may be proven by circumstances or by the direct testimony of the witnesses, but unless it is proven to your satisfaction beyond a reasonable doubt that the acts charged in the indictment were done for the purpose and with the intent charged in the indictment, it will be your duty to return a verdict of not guilty." (Transcript of Record, pp. 110, 111, 446, 460; Assignment of Error No. 180.)

"The Court instructs you that you are to consider only the crime with which the defendant is charged. If you find from the evidence that he is not guilty of the offense charged in the indictment, it will be your duty to find him not guilty, although you may believe him guilty of some other offense. The defendant has a legal right to insist that all the elements that constitute the crime with which he is charged shall be proven to your satisfaction to a moral certainty and beyond a reasonable doubt, and unless such element is so proven it will be your duty to return a verdict of not guilty." (Transcript of Record, pp. 112, 446, 461; Assignment of Error No. 183.)

Furthermore, the charge to the jury, above quoted, is erroneous in another material respect. A defendant in a criminal action testifying in his own behalf is entitled to have his testimony submitted to the jury. The instruction complained of practically informed the jury that they should disregard all the testimony of the defendant touching his reasons for going to Reno—it practically withdrew from

the consideration of the jury defendant's testimony upon the subject of intent.

People v. Keefer, 65 Cal. 232.

This assignment of error, alone, should entitle the defendant to a new trial.

“An instruction which is calculated to confuse and mislead the jury should not be given. And if the instruction of the court be given, in terms which may have misled the jury, it is ground of reversal; especially if it appears that they were actually misled.

Appellate practice—Where the charge of the judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected in an appellate court.”

7 Encyc. of U. S. Sup. Ct. Repts., tit. “Instructions”, p. 33, Sec. 9 and cases cited.

XV.

The Trial Court Erred In Refusing to Give the Following Instructions Requested on Behalf of the Defendant:

“In a criminal case, admissions and confessions of the accused are admitted with caution, and the court tells you that it is your province to consider all the circumstances under which the alleged admissions were made, and determine their exact nature, import and meaning.” (Transcript of Record, pp. 100, 446, 451; Assignment of Error No. 159.)

“I further charge you that some evidence has been offered of statements made by the defendant shortly after his arrest upon warrants issued at Sacramento for violations of the law of the State of California and not for any violation of the White Slave Traffic Act, and I charge you in relation thereto that such statements so made shortly after his arrest are to be received with great caution; for besides the danger of misapprehension of a witness, or the misuse of words, the failure of the party to express his own meaning, it should be recollected that the mind of the defendant himself is often oppressed by the calamity of his situation and you should further consider whether or not the defendant at that time was endeavoring to shield Miss Norris and Miss Warrington in their good names and from prosecution by the state authorities.

And in this connection you are to consider all the facts and circumstances surrounding the making of such statements by the defendant as well as the statements made by Miss Lola Norris as to the truthfulness of the statements made by Miss Lola Norris, for the purpose of determining whether or not the statements made by the defendant at that time were true or were simply feigned for the purpose of

warding away suspicion and of shielding Miss Lola Norris or Miss Warrington or both.” (Transcript of Record, pp. 121, 122, 446, 469, 470; Assignment of Error No. 198.)

“You are hereby instructed that no pleading of a party, nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate in any Court of the United States, in any criminal proceeding, and in this connection I instruct you to disregard entirely from your consideration in this case any and all statements claimed to have been made by the defendant to Assistant District Attorney Atkinson, the Assistant District Attorney of Sacramento, Sacramento County, California, it appearing that such statements were made while the defendant was under arrest by the state authorities at Sacramento, California, and that such statements were obtained by means of the judicial proceeding then pending in the state Courts at Sacramento, California.” (Transcript of Record, pp. 122, 123, 446, 470; Assignment of Error No. 199.)

In urging, upon this appellate tribunal, a reversal for error in failing to give the above instructions, or some of them, much that is argued in a subsequent portion of this Opening Brief, under subdivision XXI hereof, in contending that the statements or admissions of the defendant, sought to be established through the witness W. E. Doan, were inadmissible, is applicable to the failure of the trial Judge to give the above instructions requested on behalf of the defendant. Avoiding repetition, we

refer to the argument subsequently urged and respectfully submit that, in view of the peculiar circumstances under which the statements or admissions of the defendant were obtained, the above instructions, or at least some of them, should have been given by the trial Judge.

XVI.

The Trial Court Erred In Refusing to Give the Following Instruction Requested on Behalf of the Defendant:

“I further instruct you that you are not to permit yourselves to be influenced by the fact that Maury I. Diggs, the defendant in another case, may or may not be guilty under the indictment and proofs presented in the case against him, but you are to try this defendant, and to base your verdict, if satisfied of his guilt to a moral certainty and beyond all reasonable doubt, solely and exclusively and entirely upon the indictment in this case and upon the testimony, proofs and evidence in this case and in this case alone.” (Transcript of Record, pp. 119, 120, 446, 468; Assignment of Error No. 195.)

We contend that it was reversible error on the part of the trial Judge not to give the above instruction.

A casual reading of the record discloses that the trial Judge, by reason of the liberality of his rulings in favor of the prosecution, permitted the evidence in the case to take a very wide range; in fact, way beyond the single issue presented by the indictment. On this account, the conduct and acts of Maury I. Diggs were given great prominence and may be said to permeate the entire case. Although the defendant was not on trial for a conspiracy with Maury I. Diggs to violate the “White-slave traffic Act”, the trial Judge, in his rulings admitting evidence against the defendant, practically took the attitude that many of the things said and done by Maury I. Diggs

could be admitted in evidence against the defendant Caminetti, inasmuch as the prosecution was one akin to a conspiracy. (Transcript of Record, pp. 252, 253, 217.) We have already complained of these rulings of the trial Judge in previous portions of this Opening Brief. We do insist that, in view of the rulings of the trial Judge in admitting evidence as to the things said and done by Maury I. Diggs and in view of the great paucity of evidence against the defendant Caminetti, the above cautionary instruction requested on behalf of the defendant should have been given. The jury should have been clearly and distinctly instructed that they should not permit themselves to be influenced by the fact that Diggs, the defendant in another case, might or might not be guilty under the indictment and proofs presented in the case against him. It must be remembered that reference was constantly made to the Diggs case during the trial. Even, during the opening argument of one of the prosecuting attorneys, the Diggs case was alluded to (Transcript of Record, p. 418.) The prosecuting attorney, in that argument, even went so far as to state to the jury that: "It is difficult for me to distinguish all of the evidence in this case from all of the evidence in the Diggs case."

Without dilating further on this assignment of error, we respectfully submit that the state of the record fully justifies us in the contention we make that the trial Judge committed reversible error in not giving the above instruction.

XVII.

The Trial Court Erred in Its Instruction to the Jury as Follows:

“As I have indicated to counsel *in passing upon the defendant's motion to instruct the jury to acquit*, the evidence introduced before you by the Government, if believed by you, is sufficient in its legal aspects, that is, in law, to make a case against the defendant under each one of these counts.” (Transcript of Record, pp. 48, 412-414, 438, 439; Assignment of Error No. 17.)

The trial Court's instruction to the jury was entirely too strong and amounted, practically, to an instruction to convict.

In the case of *Breese v. United States*, 108 Fed. 804, being a decision by the Circuit Court of Appeals for the 4th Circuit, it was held that an instruction, on a trial for violating the banking law, that, “in his opinion, it was the duty of the jury to convict the defendant”, was ground for new trial, as calculated to mislead the jury, who would, perhaps, construe the language as a direction on the part of the Court.

Twice did the trial Judge distinctly tell the jury that the evidence was sufficient, in law, to justify the conviction of the defendant on all four counts of the indictment.

The first time, as stated by him in the above instruction, was “in passing upon the defendant's motion to instruct the jury to acquit”, and the sec-

ond was when he instructed the jury as above stated. Such comments must have had a deep effect upon the jurors and were highly prejudicial to the defendant. In fact, a perusal of the entire charge, as well of the rulings throughout the trial, compels us to state that the trial Judge believed the defendant guilty on all four counts of the indictment and considered it proper to impart his views to that effect to the jury. We respectfully submit, that, under the circumstances disclosed by the record in this case, what the learned trial Judge said in the presence of the jury, in denying the motion to instruct to acquit, and afterwards in delivering his instructions to the jury, was not only a plain and open declaration to the jury that the trial Judge was convinced of the guilt of the defendant, but that his language and remarks were tantamount to an instruction to convict.

See particularly on this subject, the remarks of the Court of Appeals of New York, in the leading case of *People v. Becker*, 104 N. E. 396, 408.

XVIII.

The Trial Court Erred in Its Refusal to Instruct the Jury as Follows:

“I further instruct you that before a statement or declaration by one conspirator, made after the consummation of the conspiracy or the commission of the crime, is competent against the other, it must not only appear that they were uttered in his presence, but it must further also appear that the circumstances must have been such as to call for a denial by the accused and to have given him an opportunity to make such denial.” (Transcript of Record, pp. 119, 446, 467; Assignment of Error No. 194.)

If the learned Judge of the Court below attributed so much importance to the conspiracy features of the prosecution, as indicated repeatedly by his rulings on the subject, he certainly should have given the above instruction.

In this connection, we beg to refer to the authorities and the rules of law cited in the subdivision of this Opening Brief, immediately succeeding the one now under consideration.

XIX.

The Trial Court Erred in Admitting the Following Testimony:

“Q. After the two bills were paid by one of the individuals because you did not have any change to change both gold pieces, what if anything was said by either of the two men in the presence of the other as to their destination?

Mr. WOODWORTH. That is objected to as immaterial, irrelevant and incompetent, a proper foundation is not laid for the conversation.

The COURT. The objection is overruled.

Mr. WOODWORTH. We reserve an exception.

A. The gentleman, I could not say which one, but one remarked that they had tickets for Denver and wanted to catch No. 10.

Q. Do you recall at what time No. 10 left that morning?

Mr. WOODWORTH. Just a moment. I move that the answer be stricken out upon the ground that it is unfair, he cannot say which one said it.

The COURT. They were both together, he says.

Mr. WOODWORTH. They were both together, but it makes a great deal of difference who made the statement.

The COURT. Oh, no, not materially. Statements made in the presence of the defendant are just as material, unless he repudiates them, as though they were made by him. It all goes to the jury for them to determine the facts.

Q. When that statement was made by one of these two individuals was there any objection of any kind to that statement emanating from the other party?

Mr. WOODWORTH. That is objected to as immaterial, irrelevant and incompetent and an improper question to ask; and further that it is asking for the opinion of the witness.

The COURT. The objection is overruled.

Mr. WOODWORTH. We reserve an exception.

The COURT. You mean was there anything said by the other party, I suppose?

Mr. ROCHE. Yes, your Honor, that is what I mean.

A. No, sir." (Transcript of Record, pp. 53, 54, 446, 181, 182; Assignments of Error Nos. 34, 35.)

We contend that it was error for the trial Court to admit the above testimony as against the defendant Caminetti.

Testimony, as to utterances in a party's presence, is generally received on the theory that a failure to deny what is so asserted is an implied admission of the truth of the statement. But there is no ground for presuming acquiescence of such statements unless they are of such a character as would naturally call for a response, and unless the party, sought to be charged, was in such a situation that he would probably have replied to them.

Jones on Evidence, 291.

While a statement made in the presence of an accused is not admissible, as being itself evidence of any fact narrated therein, it is admissible primarily for the purpose of showing such conduct on the part of the accused as fairly implies assent.

"The conduct of the defendant is the gist of the inquiry, and it is the only matter to be considered and weighed by the jury. The statements of third persons are admitted only as pre-

liminary to the inquiry, and for the purpose of showing conduct.”

People v. Ah Yute, 54 Cal. 89;

People v. Mallow, 103 Cal. 513;

People v. Wong Lung, 159 Cal. 513;

Stowell v. Hall, 56 Or. 256; 108 Pac. 182.

We submit that the above testimony should not have been admitted.

But, being admitted, the cautionary instruction referred to in the subdivision of this Opening Brief, just preceding the one now under consideration, should at least have been given to the jury.

XX.

The Trial Judge Erred in His Rulings That the Prosecution Amounted Practically to one for a Conspiracy.

We have adverted to this feature of the case on several previous occasions in this Opening Brief, and we deem it unnecessary to present further argument in support of the proposition we maintain that the rulings of the trial Judge in this respect were deeply prejudicial to the defendant and were erroneous.

We refer to but two of several instances where the trial Judge ruled erroneously, as we contend.

“Q. Was Mr. Diggs the only man you had ever had intercourse with in your life?

A. Yes——

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. Oh, I think it is a circumstance.

Mr. HOWE. We note an exception.

The COURT. She has answered the question.

Mr. ROCHE. Q. Where did that first act of intercourse take place?

A. In his office.

Q. Just state the circumstances under which that first act of intercourse took place?

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. *I don't see that that is material.*

Mr. ROCHE. Very well; I won't press it. I would like to ask just one question, though, with reference to that matter.

Q. At the time that this first act of intercourse took place between yourself and Mr. Diggs in his office, or rather, before that time, and upon that occasion, had you been furnished with any champagne?

A. Yes——

Mr. HOWE. One moment. That is objected to as immaterial, irrelevant and incompetent.

The COURT. Yes. I think so. *Well, I don't know about that. I will let the answer stand. The evidence of the Government tends to show that it was a transaction that really was united in by these four different people—that is, I mean the history of the transaction out of which the offense is charged, and I am inclined to think that in such an instance, very similarly to the rules showing a conspiracy, that you may show all the circumstances. Proceed.*

Mr. HOWE. We note an exception.

Mr. Caminetti was in the office at the time *although not in the same room.* Miss Norris was also in the office at the time, *although not in the same room.*” (Transcript of Record, pp. 252, 253; Assignment of Error No. 70, p. 66.)

Upon another occasion, the trial Judge again likened the prosecution to one for conspiracy, saying:

“The COURT. The objection is overruled. The evidence tends to show, Mr. Woodworth, that this was a transaction in which four people were engaged, the defendant and another man and these two girls; of course, under such circumstances the declaration of any one of them made in the presence of the other may be permitted to go before the jury, all the circumstances being shown, the jury will determine whether or not what was said affects the others by ascertaining whether any denial of the declaration was made, and the other circumstances which would tend to show whether the declaration of the one was intended to imply an understanding of the others as to what the transaction involved. *In such a case it is very much like a prosecution for conspiracy, only here, of course, it is admitted simply because*

and only because it is made in the presence of the defendant—made either by or in the presence of a defendant. The law is that you may give such declaration in evidence and then if it appears that the defendant remains silent, or that he acquiesced, it will be taken as evidence tending to connect him with the transaction; it is not conclusive at all, but it all goes to the jury for their consideration.

Mr. WOODWORTH. *The point we make is that the defendant is indicted here simply for having violated the White-slave traffic Act. He is not indicted for conspiracy.*

The COURT. Mr. Woodworth, I understand the situation thoroughly, and I have ruled. I never permit a discussion after I have ruled. I cannot do it because it takes too much time.

Mr. WOODWORTH. We take an exception to the ruling and to the reasons stated by the Court." (Transcript of Record, p. 217; Assignments of Error Nos. 56, 57, 58, 59, pp. 62-63.)

We consider that much of the testimony, that was admitted under the guise that proof of the charges for a direct violation of the "White-slave traffic Act" practically involved a conspiracy, was very harmful to the defendant Caminetti. The trial Judge, throughout the trial of the case, was entirely too liberal in permitting of the admission of testimony and evidence on the part of the prosecution, and his rulings, in this connection, amounted to reversible error.

XXI.

The Trial Court Erred in Permitting the Witness W. E. Doan, Official Shorthand Reporter of the Superior Court of Sacramento, to Testify to Certain Admissions Made by the Defendant and by Lola Norris.

All of the exceptions taken to the rulings of the trial Judge in admitting and refusing to strike out the testimony of the witness W. E. Doan, which have been assigned as error, will be considered together.

The witness W. E. Doan was called on behalf of the prosecution. He testified that he held the position of official shorthand reporter of the Superior Court of Sacramento. He was permitted to testify, over the constant objections of counsel for the defendant, to certain statements made by the defendant to F. F. Atkinson, assistant district attorney of Sacramento County, while he was under arrest by the state authorities from Sacramento. The Transcript of Record, pages 330 to 335 inclusive, will disclose, more clearly than can be described in this brief, what really took place in Court in connection with the admission of the testimony of the witness Doan. At the conclusion of his *direct examination*, a motion to strike out the testimony of the witness was made. Again, at the close of all the testimony and before the case was submitted to the jury, a similar motion was made to strike out his testimony, both of which were denied. (See Assignments of Error Nos., 88, 89, 90, 91, 122, 123;

Transcript of Record, pp. 71, 72, 73, 82, 330-335, 336-356.)

It is contended that the trial Judge should not have permitted the introduction of the testimony of the witness Doan as to any statements or admissions claimed to have been made by the defendant Caminetti to the prosecuting attorney of Sacramento County; that is, under the circumstances developed by the evidence, these alleged statements or admissions of the defendant Caminetti should not have been permitted.

A reading of the testimony of the witness Doan discloses that these statements or admissions were elicited from the defendant to be used in certain prosecutions then pending in Sacramento against the defendant Caminetti and Lola Norris for violations of the state laws and not for violations of the "White-slave traffic Act". At the time that the statements or admissions were extracted from the defendant, he was not accused and was not under arrest for any violation of the "White-slave traffic Act", but had been arrested, and was then traveling in the custody of the police officers from Reno to Sacramento, upon warrants issued against him for violations of the laws of the State of California. This is made plain by the testimony of the witness Doan, as follows:

" 'Mr. ATKINSON. Mr. Caminetti, you know all these gentlemen, I guess, Mr. Doan, the Shorthand Reporter; you were introduced to the Chief of Police William Johnson of Sacramento, Detective Ryan of the Police Force, and

myself, Assistant District Attorney of the County of Sacramento, Atkinson. The officers *have warrants for you*, as you probably know, *warrants for your arrest*. You have been charged or will be charged with possibly two offenses; *one of contributing to the dependency of Miss Norris, a girl under 21 years of age, and with living in a state of adultery and cohabitation with her, you being married to some one else, and also a felony charge of deserting and abandoning your minor child*. You were brought back to this point from Reno by the officers, and we have come to talk with you about the matter before you reach Sacramento, ask you questions. You are not obligated to make any statement about the matter. Everything you say must be said freely and voluntarily and with a knowledge on your part that anything you say can and will be used against you in the event that judicial proceedings are taken against you on these charges, or any of them. You understand that, do you?

A. Yes, sir.

Q. *In other words, you know what your rights are?*

A. Well, no.

Q. Is there any question you want to ask me about them?

A. I would like to know the reason for you gentlemen coming up to meet us this morning?

Mr. ATKINSON. Two reasons. To talk to you before you reach Sacramento and before the newspaper reporters get hold of you, and also to forestall any scene or disturbance that might be created or had upon your arrival at Sacramento.

A. Mr. ATKINSON. I will ask you another question: *Do you think that I ought to say anything without first consulting an attorney?*

Q. *You are a man of discretion and you know what your rights are, and that sort of*

thing. You have already talked, as I have found. You suit yourself now.

A. I beg pardon, what was that?

Q. I say suit yourself.

A. Just before that?

Q. I say I understand that you have already talked about the episode.

A. Not to reporters.

Q. Well, to the others. I am going to ask you questions and you do as you see fit. You are 23 or 28?

*A. Let's see, I am 27, I believe.' * * **

"Mr. WOODWORTH. Q. The defendant was under arrest at that time, was he not, Mr. Doan?

A. I believe so." (Transcript of Record, pp. 336, 337.)

Therefore, at the time that the statements were elicited from the defendant Caminetti, he was under arrest and in the custody of police officers from Sacramento, and he was under arrest for violations of the laws of the State of California and *not of the United States*. He was under arrest and was being brought back to Sacramento upon warrants charging him with having abandoned or deserted his wife and children, and also with contributing to the delinquency of a minor, to wit, Lola Norris, who was then just under twenty-one years of age, both criminal offenses in California. He was not under arrest for any supposed violation of the "White-slave traffic Act". Indeed, the "White-slave traffic Act" was never, at any time, mentioned by any of the officials who arrested the defendant and who interrogated him. In fact, an infraction of the "White-slave traffic Act" was not even thought of at the

time. It was only after the return of the defendant Caminetti to Sacramento that a prosecution under the "White-slave traffic Act" was, *for the first time*, suggested or considered. *It was an afterthought.* All this is made clear by the uncontradicted testimony in the case. On cross-examination, Chief of Police Hillhouse of Reno testified as follows:

"I did not have any warrants for the arrest of these four people. I arrested them on word from the Chief of Police from Sacramento, a communication, a wire and telephone message. He said he had a warrant for them. He said for Mr. Diggs and Mr. Caminetti. I don't remember him saying anything about a warrant for the two ladies. Well, he told me to hold the four of them. That is, to arrest all four. He gave me no further instructions with reference to taking them to California, he just stated he had a warrant. I had nothing further than this telephone warrant. I simply got a telephone from the Chief of Police to arrest these two men and also to apprehend the girls. I don't just remember the charge. I don't know whether it was something like wife-abandonment or something like that. *I told them I had a communication from the Chief of Police in Sacramento to arrest them and hold them for wife abandonment.* Well, Mr. Diggs said all right, he didn't fear anything, he said. I don't remember just what the defendant said now. He didn't say very much at the time. *The White-slave traffic Act was not mentioned at all.*

" 'Mr. WOODWORTH. Q. *The White-slave traffic Act was not mentioned in any conversation you had with this defendant or with Mr. Diggs?*

" 'A. *It was not mentioned.*' "

* * * * *

“When they left Reno they were not in the custody of any one from my office. They were in the custody of Sacramento officers. The Sacramento officers had come for them. *They were not then in the custody of United States officers.*” (Transcript of Record, pp. 220-222.)

From the above references to the testimony, it appears, (1) that the defendant, at the time of the making of the statements, was under arrest and in the custody of the police officers from Sacramento; (2) that he was under arrest by virtue of warrants issued by the state authorities at Sacramento for violations of the state laws; (3) that he was not under arrest at that time because of any warrant issued by the federal government for any violation of the “White-slave traffic Act”; (4) that, at that time, no prosecution by the federal government for any violation of the “White-slave traffic Act” had been initiated or any warrant of arrest issued, nor was the defendant informed of any possible prosecutions under the “White-slave traffic Act”; (5) that the statements were elicited from the defendant by F. F. Atkinson, the assistant district attorney from Sacramento, who, it appears, accompanied the police officers from Sacramento as their legal adviser in supervising the arrest of the defendant and compelling his speedy return, in the custody of the officers, from Reno, State of Nevada, to Sacramento, State of California.

Under this state of facts, we respectfully contend that any statements or admissions elicited from the

defendant by Assistant District Attorney Atkinson were inadmissible in an entirely different prosecution, and in a different Court and jurisdiction. Assuming, but not conceding, that the statements or admissions of the defendant would have been admissible in any prosecution for violations of the state laws, for which the defendant had been arrested and brought back to Sacramento, we contend that such statements or admissions should not have been admitted in a prosecution of an entirely different nature and of which the defendant, at the time of the making the statements or admissions, was not apprised and was in complete ignorance.

In other words, statements or admissions cannot be elicited from a defendant in one proceeding and upon a certain charge and then an attempt made to use those statements or admissions against the defendant in an entirely different proceeding and upon an entirely different charge and in a different Court and jurisdiction unless the defendant is fully and fairly informed of such purpose and threatened danger. The law will not permit of such jugglery, nor will it sanction such a subterfuge and fraud upon the rights of one accused of crime. It is elementary law, that statements, admissions or confessions, to be admissible, must be voluntary and free from fraud or duress, and no unfair advantage must be taken of the accused person. We can conceive of no greater fraud or of a more unfair advantage practiced upon a person under arrest upon one charge than to elicit statements or admissions

from him for the purpose, ostensibly, of using them against him, and then to employ them on another and an entirely different charge, not then in existence but to be instituted thereafter in an entirely different Court and jurisdiction. Yet, such is the result of the situation developed by the evidence in the case at bar. The defendant is arrested at Reno by police officers from Sacramento, who are accompanied by an assistant district attorney from Sacramento acting as the legal adviser of the police officers, and intent bent that no legal obstacle should prevent the return of the defendant in the custody of the police officers from Reno to Sacramento. While the defendant is actually traveling on a train from Reno to Sacramento, and in the custody of the police officers and constantly under their surveillance, the assistant district attorney from Sacramento undertakes to subject him to a searching cross-examination and takes the precaution of having the answers and questions taken down by the official shorthand reporter of the Superior Court of Sacramento. He not only thus examines the defendant and reduces all his statements to writing so that they can be preserved and used against him, but he pursues a similar course with reference to Lola Norris. Not content with that course of conduct, he goes even to the extent of at times examining the defendant alone and separately and without the presence of Lola Norris and then, upon other occasions, when it suits his purpose, he confronts

one with the other and repeats such statements to them, as he regards of an incriminatory nature, expecting, undoubtedly, to trap the defendant and Lola Norris into irreconcilable contradictions, or, as to some other matters, hoping that they might confirm, in each other's presence, some fact which he regards as particularly derogatory and incriminatory. We hazard the assertion that had the above statements or admissions of the defendant been offered in the state Court at Sacramento in the very prosecution for violations of the state laws for which the defendant was then under arrest and in custody, and to which his examination by the assistant district attorney of Sacramento was then directed, their offer would have been promptly excluded. In no event would the statements or admissions of the defendant have been admissible in the state Court under the state law.

Section 1324 of the Penal Code of the State of California, as amended March 24, 1911 (Stats. 1911, p. 485), provides:

“A person hereafter offending against any of the provisions of this code or against any law of this state, is a competent witness against any other person so offending, and may be compelled to attend and testify and produce any books, papers, contracts, agreements, or documents upon any trial, hearing, proceeding or lawful investigation or judicial proceeding, in the same manner as any other person. If such person demands that he be excused from testifying or from producing such books, papers, contracts, agreements or documents, on the

ground that his testimony or that the production of such books, papers, contracts, agreements or documents may incriminate himself, he shall not be excused, but in that case the testimony so given and the books, papers, contracts, agreements and documents so produced shall not be used in any criminal prosecution or proceeding against the person so testifying, except for perjury in giving such testimony, and he shall not be liable thereafter to prosecution by indictment, information, or presentment, or to prosecution nor punishment for the offense with reference to which his testimony was given, or for or on account of any transaction, matter or thing concerning which he may have testified or produced evidence, documentary or otherwise.

No such person shall be exempt from indictment, presentment by information, prosecution or punishment for the offense with reference to which he may have testified as aforesaid, or for or on account of any transaction, matter or thing concerning which he may have testified as aforesaid, or produced evidence, documentary or otherwise, where such person so testifying or so producing evidence, documentary or otherwise, does so voluntarily or when such person so testifying or so producing evidence, fails to ask to be excused from testifying or so producing evidence, on the ground that his testimony or such evidence, documentary or otherwise, may incriminate himself, but in all such cases, the testimony or evidence, documentary or otherwise, so given may be used in any criminal prosecution or proceeding against the person so testifying or producing such evidence, documentary or otherwise.

Any person shall be deemed to have asked to be excused from testifying or producing evidence, documentary or otherwise, under this

section, unless before any testimony is given or evidence, documentary or otherwise, is produced by such a witness, the judge, foreman or other person presiding at such trial, hearing, proceeding or investigation, shall distinctly read this section of this code to such witness, and the form of the objection by the witness shall be immaterial, if he in substance makes objection that his testimony or the production of such evidence, documentary or otherwise, may incriminate himself, and he shall not be obliged to object to each question, but one objection shall be sufficient to protect such witness from prosecution for any offense concerning which he may testify, or for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, upon such trial, hearing, proceeding or investigation."

Under the above section, were this a prosecution in the state Court, the statements or admissions made by the defendant Caminetti to F. F. Atkinson, the assistant district attorney of Sacramento County, would not be admissible for the reason that the assistant district attorney did *not read this section of the code to the defendant* before interrogating him and obtaining his statements or admissions. The state code provision is mandatory in this respect.

Not being admissible under the laws of the State of California, we contend that the statements or admissions were likewise not admissible in the prosecution in the federal Courts for a violation of the "White-slave traffic Act".

It is well settled that the state laws of evidence are rules of decision on trials at the common law in the United States Courts.

Hinds v. Keith, 57 Fed. 10; 3 U. S. App. 222;
Ryan v. Bindley, 68 U. S.; (1 Wall) 66, 17
L. Ed. 559.

There is no pretense that the assistant district attorney of Sacramento complied with the state statutory requirement and read section 1324 of the Penal Code of the State of California to the defendant. Failing to do so, the statements or admissions obtained by such prosecuting officer could not afterwards be used against him in the state Courts, and, we contend, were equally inadmissible against him in the federal Courts. .

Failure by the assistant prosecuting attorney of Sacramento to rigidly observe the requirements of section 1324 of the Penal Code, in not reading that section to the defendant, rendered the statements, admissions, or confession, claimed by the prosecution to have been made by the defendant, inadmissible.

In the State of Texas, there is a somewhat similar provision.

Texas Code Cr. Pro., sec. 790, provides:

“A confession shall not be used, if at the time it was made the defendant was in jail, or other place of confinement, nor while he is in the custody of an officer, unless such confession be made in a voluntary statement of the accused taken before an examining court in accordance

with law, or be made voluntarily, after having been first cautioned that it may be used against him, or unless in connection with such confession he makes statements of facts, or of circumstances, that are found to be true, which conduces to establish his guilt—such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed.”

Applying this statute, in the case of *Morales v. State*, 36 S. W. 435, it was held to be error to permit the sheriff to testify that defendant, *while in jail*, had made the statement that “he killed deceased for his money, but that he did not get any”, the requirements of that statute not having been observed.

The same rule was upheld and followed in the case of *Wright v. State*, 37 S. W. 734.

The general observations made by the Supreme Court of the United States, in the recent case of *Weeks v. United States*, 34 Sup. Ct. Rep. 341, 344, are pertinent. Speaking through Mr. Justice Day, the Supreme Court said:

“The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.”

Without further elaborating upon this proposition, we submit:

First: That inasmuch as the statements or admissions would be inadmissible in the state Courts because of the failure of the assistant prosecuting attorney of Sacramento to read section 1324 of the Penal Code of the State of California, they are equally inadmissible in the federal Courts.

Second: That the statements or admissions were not voluntary or free from fraud, and that an undue advantage was taken of the defendant, for the reason that when the statements or admissions were obtained from him he was not informed or advised that they were likely to be used in a prosecution against him for a violation of the "White-slave traffic Act". In other words, the statements or admissions were obtained from him under the guise and pretense that they might be used against him in certain prosecutions then pending against him in the state Courts of Sacramento upon charges entirely different from those afterwards instituted against him in the federal Courts for violations of the "White-slave traffic Act". The defendant should have been fully instructed by the assistant district attorney of Sacramento County that the statements or admissions then and there made by him might be used against him in a prosecution in the federal Courts for violations of the "White-slave traffic Act". This, confessedly, was not done. In fact, the evidence justifies us in saying that the prosecution in the federal Courts for violations of the "White-

slave traffic Act" were not even dreamt of at the time the statements or admissions were extracted from the defendant and that his subsequent arrest and turning over to the federal authorities was a mere afterthought.

Third: Finally, we submit that the entire investigation or examination held by the assistant district attorney of Sacramento County was highly improper and constituted a gross violation of the defendant's constitutional right not to be compelled to incriminate himself. The character of the examination, the manner in which it was held, the then situation of the defendant under arrest and in custody, the situation likewise of Lola Norris, who, if not then under actual arrest, was under surveillance and constant menace of arrest, the insistency of the assistant prosecuting attorney in plying questions to the defendant and to Lola Norris when both had expressed a disinclination to talk, and the controlling and all-important fact that the defendant was never apprised by any one of any impending prosecution for violations of the "White-slave traffic Act", such a matter not even being discussed, justify us in contending that the trial Judge committed serious error, to the prejudice of the defendant, in admitting any of the statements or admissions of the defendant obtained from him under the circumstances disclosed in the case at bar, and we respectfully submit that our numerous objections to the admission of this class of evidence should have been

sustained and our motions to strike out the evidence granted.

It is interesting to note, in this connection, that under the provisions of section 860 of the Revised Statutes, the statements or admissions of the defendant would have been excluded, for that section provided:

“No pleading of a party, nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture.”

It is true that this section of the Revised Statutes was repealed by the Act of Congress of May 7, 1910 (Stats. at Large, vol. 36, page 352). But the repeal of this section of the Revised Statutes did not operate also to deprive one accused of crime of his paramount constitutional right not to be compelled to incriminate himself or to be a witness against himself. The fundamental and sacred constitutional rights surrounding persons accused of crime, which have for their mighty object the protection of the innocent, still remain in force, and the well settled rules of law and evidence relating to and governing the admissibility of statements or admissions or confessions of one accused of crime remain the same; that is, they must be voluntary; they must be free from trick or fraud; they must be fairly obtained and no undue advantage taken of one ac-

cused of crime; they must be open and above-board and not the result of ruse, or of artifice, or of chicanery; the person accused of crime must be fully and fairly warned and advised of his rights and of what he is accused, and the statements cannot be extracted from him under the guise and subterfuge that he is to be prosecuted for one offense only to find later on that he is being prosecuted for another offense, to which his attention was never called or of which he was totally ignorant at the time the statements, or admissions, or confession, were obtained from him.

It being established that the rulings of the Court below were erroneous, the legal presumption is that error produces prejudice.

Pettibone v. Territory of New Mexico, 201 Fed. 492.

The use made of statements or admissions, or a confession obtained from a defendant, precludes the prosecution from contending that it was not to his prejudice.

Bram v. U. S., 168 U. S. 532; 42 L. Ed. 568.

XXII.

The Trial Court Erred in Refusing to Permit the Attorney for the Defendant, in His Opening Statement to the Jury, to Read Those Portions of the "White Slave Traffic Act", Under Which the Defendant Was Indicted and Was Then on Trial, and in Refusing to Permit the Indictment to be Read to the Jury, and in Making Prejudicial Remarks in His Rulings in That Connection.

(Transcript of Record, pp. 74, 357, 358, 359; Assignments of Error Nos. 92, 93, 94.)

In order better to appreciate the force of our contention in this regard, it will be necessary to set forth just what transpired in Court during the opening statement.

"Mr. WOODWORTH. If your Honor please, and gentlemen of the jury, in order that you may better appreciate and understand the evidence to be presented here in the defense of the defendant, I will state very briefly the character of his defense and the testimony which he expects to present in support of that defense. As you know, the defendant is indicted for a violation of the White Slave Traffic Act. That is the name given to the statute itself by Congress; we expect to show you that the defendant is not guilty of any act of white slavery, or of any act of commercialized vice, or——

The COURT. Now, Mr. Woodworth, state your facts to this jury and leave your comments upon the law until a later time, *if you are permitted to make any*. Just state the facts you propose to prove.

Mr. WOODWORTH. It is proper for us to state, I take it, that we propose to show that

under no phase of the evidence adduced by the Government is the defendant guilty of white slavery——

The COURT. All you can do now is to state what you expect to prove. The other matter is a matter of argument.

Mr. WOODWORTH. Very well, your Honor.

We expect to show, with great confidence, gentlemen of the jury, and upon the evidence that we will produce here which will convince you, that the defendant is not guilty of any of the accusations which have been made against him in the four counts of the indictment.

And so that you may better understand and appreciate the effect or force of the evidence to which I will refer, I deem it my duty at this time to read the two sections of the law upon which this defendant is indicted and to——

Mr. ROCHE. We object to that, your Honor.

Mr. WOODWORTH. *What, you object to the jury knowing what the law is?*

Mr. ROCHE. We desire to object to counsel reading the law to the jury.

The COURT. *Counsel knows that he can not do it.*

Mr. WOODWORTH. I think we can, your Honor. I think that that course is well settled here. I know that it is in my experience here, I can call the law to the attention of the jury.

The COURT. You will confine yourself to a statement of what you expect to prove.

Mr. WOODWORTH. We take an exception to the refusal of the Court to permit me to read the Statutes to the jury, the Statutes upon which the defendant is indicted.

The COURT. *You will conduct your case in the usual and orderly and proper manner.*

Mr. WOODWORTH. I think I am, if your Honor please, and we except to the ruling of the Court, respectfully, of course.

So that you may understand the evidence we propose to present here, I will now take up the indictment and refer to the different charges that have been made against the defendant. The first count of the indictment charges that the defendant on the 15th day of January——

The COURT. *Mr. Woodworth, I shall ask you again for the last time to confine yourself to a statement of the evidence. I will state to the jury what the indictment contains, and I will state to them the law that they must be governed by.*

MR. WOODWORTH. We desire the record to show that it is necessary for an intelligent opening statement of the character of proof which we propose to present, to refer to the accusations of the indictment and to the different elements, so that the jury may follow the proof.

The COURT. I don't object to your doing that, *but you must not read the indictment to the jury.*

MR. WOODWORTH. Can I not state the elements of the offense then proceed with a statement of the proofs we expect to produce?

The COURT. *I desire to warn you again to proceed and make your statement to the jury, if you have any statement to make, and make it in a proper and orderly manner.*

MR. WOODWORTH. We take an exception to the ruling of the Court. We would like to read the indictment to the jury so that they will understand the proofs." (Transcript of Record, pp. 357-359.)

Thereafter, in his opening statement to the jury, Mr. Woodworth was compelled to rely entirely upon his memory in stating to the jury the different charges contained in the four counts of the indictment, upon which the defendant was then on trial,

and in adverting to the different elements going to make up the charges contained in the four counts of the indictment, and with reference to which evidence had been offered by the prosecution, and the defense was then endeavoring to explain to the jury what evidence would be offered on its side.

We respectfully submit that the action of the trial Judge was unfair to the defendant, and that it prevented his attorney from making such a full and complete opening statement to the jury as would have clearly apprised the jurors of the character of evidence the defendant expected to adduce in meeting the various ingredients or elements of the offenses charged against him in the four counts of the indictment. We further contend that the remarks of the trial Judge, addressed to the attorney for the defendant who was endeavoring to make an opening statement to the jury, were uncalled for by anything that had transpired at the time and were calculated to prejudice the defendant's cause in the eyes of the jury.

We respectfully submit that the attorney for the defendant, making the opening statement, was entitled, and should have been permitted by the trial Judge, to read to the jury those sections of the "White-slave traffic Act" under which the defendant had been indicted and was then on trial, and he should also have been allowed to read to the jury the indictment in the case.

The rule is stated in Cyc., vol. 12, page 583, as follows:

“Counsel may, even where the jury must accept the law as laid down to them in the judge’s charge, refer to and explain the law of the case in his argument.”

See also,

McQueen v. State, 103 Ala. 12; 15 So. 824;

Warmock v. State, 56 Ga. 503;

Com. v. Porter, 10 Metc. 263;

McLain v. State, 18 Nebr. 154, 24 N. W. 720;

Hannah v. State, 11 Lea 201.

Again the rule is stated in Cyc., vol. 12, page 583, as follows:

“The statute under which the prosecution is had may be read, although it is not in evidence.”

See, also,

Com. v. Hill, 145 Mass. 305; 14 N. E. 124;

Com. v. Austin, 7 Gray (Mass.) 51;

People v. Ringsted, 90 Mich. 371; 51 N. W. 519;

State v. Dent, 170 Mo. 398; 70 S. W. 881;

State v. Morse, 66 Mo. App. 303;

State v. Sartor, 2 Strobb. (S. C.) 60.

The rule is also stated in Cyc., vol. 12, page 573, as follows:

“It is proper to read the indictment to the jury, if this is done in good faith and for the purpose of stating what the prosecution intends to prove.”

See, also,

Greenwood v. Com., 11 S. W. 811; 11 Ky. L. Rep. 220;

State v. Desroches, 48 La. Ann. 428; 19 So. 250;

State v. Pennington, 124 Mo. 388; 27 S. W. 1106;

People v. Reilly, 164 N. Y. 600; 59 N. E. 1128 (affirming 49 N. Y. App. Div. 218; 63 N. Y. Suppl. 18, 14 N. Y. Cr. 458).

The trial Judge should have permitted the attorney for the defendant, in his opening address to the jury, first to read the sections of the "White-slave traffic Act" under which the defendant was indicted, and then the indictment upon which he was being tried.

It must be remembered that the offenses for which the defendant was indicted and was then on trial were not the ordinary or common law crimes, such as robbery, larceny, murder, rape, arson, etc., etc., offenses whose character are well known to every person, but the defendant was indicted for the violation of a statutory offense, the elements of which were of a special nature. Before a defendant could be convicted under section 2 of the "White-slave traffic Act" it was necessary for the prosecution to allege and to prove: (1) a transportation in interstate commerce; (2) a transportation in interstate commerce of a woman or girl; (3) a transportation

for the purpose of prostitution or debauchery, or for any other immoral purpose (practice); (4) or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral practice. These were the elements to be alleged and proved under the first count of the indictment. The remaining three counts of the indictment, charging violations of section 3 as well as 2 of the "White-slave traffic Act", were equally involved. No defendant could be convicted unless all of these elements or ingredients of this statutory offense charged were proved beyond all reasonable doubt. It is obvious, therefore, that the trial Judge should have permitted the attorney for the defendant, in his opening statement to read to the jury these two short sections (2 and 3) of the "White-slave traffic Act" under which the defendant was indicted, so that the jury could better appreciate and understand the statement of the attorney for the defendant as to what was intended to be proved in exculpation of the defendant. The Bill of Exceptions fails to disclose that the statute under which the defendant was indicted, that is, sections 2 and 3 of the "White-slave traffic Act", were ever read to the jury at any previous stage of the proceeding. It is likewise true that the indictment in the case had not been read to the jury. No one will deny that it would have conduced to an unmistakably clearer understanding by the jury of what the de-

fendant expected to prove in his defense had sections 2 and 3 of the "White-slave traffic Act" been read to the jury by the attorney for the defendant in his opening statement and then followed it up with a reading of the indictment, containing four counts, and which was exceedingly brief. The statute and the indictment contained the cardinal points of the case and the jury was entitled to know just what the "White-slave traffic Act" prohibited. Likewise were they entitled to know, *if not at the outset of the case for the prosecution*, certainly at the outset of the case for the defendant, just what the allegations of the four counts of the indictment contained, so that they might the better understand the evidence to be presented on the part of the defendant and to do more equal justice between the prosecution and the defendant.

For the trial Judge to have denied the attorney for the defendant the right to read the statute and the indictment, under which the defendant was indicted, was, under the circumstances disclosed in the record, we submit, reversible error.

Furthermore, we complain, respectfully, that the language employed by the learned trial Judge, in refusing to permit the attorney for the defendant to read the statute and indictment, was especially harmful and prejudicial to the cause of the defense. Such remarks or comments by the Court as: "*Counsel knows that he can not do it*"; "You will conduct your case in the *usual and orderly and*

proper manner”; “Mr. Woodworth, I shall ask you again *for the last time* to confine yourself to a statement of the evidence”; “I desire to warn you again to proceed and make your statement to the jury, *if you have any statement to make*, and make it in a *proper and orderly manner*” (Transcript of Record, pp. 357-359), were, we submit, improper and prejudicial.

A perusal of the record will disclose that there was nothing in the statements of the attorney for the defendant—the language he employed in addressing the Court or the jury—which merited the severe admonitions and sharp reproofs of the trial Judge. The record shows that the attorney for the defendant was not making an attempt to argue on the law, or to argue upon and review the testimony already offered by the state, or to argue upon his own facts (Cyc., vol. 12, p. 571).

He was simply attempting to read to the jury those provisions of the statute under which the defendant was indicted and the indictment upon which he was then on trial, and he asked the privilege of doing this, so that the jury might better understand the proofs to be offered in behalf of the defendant. We respectfully submit that the trial Judge should have permitted him to do this, and should not have indulged in the severe admonitions and sharp rebukes disclosed by the record.

Accused, charged with a criminal offense, is not only entitled to have questions of law properly de-

cided, but to have his counsel fairly treated, and questions resting more or less in the discretion of the trial judge reasonably disposed of, and to have the Court, however unintentionally, show no spirit of hostility or discrimination against accused and in favor of the people.

People v. Becker, vol. 104, N. E. Rep. 396,
402, 404.

The situation developed in the case, just cited, of People v. Becker, seems peculiarly applicable to the case at bar, in view of the attitude and demeanor of the trial Judge throughout the entire case. The Court of Appeals of New York, in commenting upon the attitude and demeanor of the trial Judge in the case cited, used the following significant and expressive language:

“It may be stated very briefly but accurately that repeatedly without any objection, complaint, or request by the very able and alert district attorney, the court on its own motion criticised the defendant’s counsel for some little peculiarity in the form of his questions which was utterly innocuous; intervened to protect the people’s witnesses on cross-examination; objected to and excluded questions asked by defendant’s counsel; and on one occasion, when such counsel asked if the district attorney would concede a fact about which apparently there was no dispute, the court ruled for the district attorney, ‘No, I will not let him concede it.’

“At times on making an objection or asking a question, which does not appear from the record to have been contumacious or ridiculous, or an attempting to make a suggestion or give a reason in what seems from the record to have been

a respectful manner, defendant's counsel was told that he was 'becoming trivial', and commanded to 'sit down', or, 'Mr. McIntyre, you know better than to object', or that, 'there is no necessity of being so explosive about it', or, 'Now wait, stop that manner', or 'You will save time by not indulging in so much talk', or, 'No argument'. Perhaps in the interest of exactness we are justified in quoting two passages, the first of which occurred on the cross-examination of the people's important witness Luban: 'The Court. This has been all gone over. I will declare this examination closed if there be no further question. The witness has been under cross-examination for two hours and a quarter. Mr. McIntyre. I can't help it, your Honor. The Court. It will be helped unless you put the question. No discussion at all. I have told you what I will do.' In the other case, when defendant's counsel addressed to the witness a question, the following occurred: 'The Court. How is that material? Mr. McIntyre. I am going to show that there was a conversation. The Court. Not what you are going to show. * * * Mr. McIntyre. I wanted to show that there was opportunity to conspire and confer. The Court. Come to order. I shall not hear what you wanted to do. I will only hear questions. Mr. McIntyre. Your Honor asked me how it was material? The Court. I asked the district attorney.' The district attorney had taken no part in the incident. At other times haste seemed to become the essence of the trial, and defendant's counsel on asking some question or requesting some not unusual indulgence were harshly admonished to, 'Get along', or, 'Go along', or, 'Time is too precious'. On one occasion when the leading counsel for defendant pleaded weariness and asked that his associate might take his place in the cross-examination of a witness, the request

was summarily denied. On another occasion it was proposed as an apparent reason for denying counsel's request for an adjournment that the cross-examination be turned over to his associate. With one exception, so far as we are able to discover, every appeal by defendant's counsel to the discretion of the Court for an adjournment, for the very common leave to reopen the examination of a witness in order to correct some inadvertent omission or utilize on cross-examination of a hostile witness some newly-acquired information or to call a witness who had been absent was denied, whereas applications of a similar character on the part of the people were quite uniformly granted.

"A witness named Shea was an important one for the defense, and he was cross-examined at considerable length by the people. At the close of such cross-examination the following occurred: 'Mr. Hart (defendant's counsel). I just want to ask one question. The Court. No. Call your next witness. Mr. McIntyre. We desire to call the witness for several questions. The Court. I shall not permit you. Time is too precious.' It was no exception that the district attorney, without objection or criticism, was allowed a redirect examination of his witnesses.

"At the close of the original examination of Schepps, the following occurred: 'Mr. McIntyre. I don't think I can conduct the cross-examination any further on the main issue. I am too exhausted, I am too tired. The Court. Let us have no more about exhaustion. We have heard enough about that. The Court. * * * Have you another witness waiting, Mr. District Attorney? Mr. Whitman. Mrs. Rosenthal has been waiting all day. * * * She appears to be exhausted. I will call her if your Honor thinks best. Her examination will take some time. Mr. McIntyre. I join in the request. Won't your Honor please adjourn to-night? The Court. Yes.'"

XXIII.

The Trial Court Erred in its Rulings and in its Comments and the Prosecuting Attorneys Likewise Erred in the Questions Propounded and the Comments Made by Them, With Reference to the Alleged Conduct of the Defendant Caminetti With Certain Girls Other Than Lola Norris and Marsha Warrington.

The attorneys for the prosecution repeatedly endeavored to inject into the case the alleged relations of the defendant Caminetti and of Maury I. Diggs (who was not a defendant in this case) with certain girls other than Lola Norris or Marsha Warrington. They repeatedly asked questions designed to elicit such testimony. They intimated time and again that the defendant Caminetti had sustained illicit relations with girls other than Lola Norris. They referred to certain "telephone girls". Their conduct, in this connection, was assigned as misconduct and exception taken thereto as well as to the rulings of the Court in permitting questions of such character to be asked and in not rebuking the prosecuting attorneys for propounding such interrogatories and making such comments.

(Transcript of Record, pp. 75, 76, 77, 81, 370-371, 373-374, 376-377; Assignments of Errors Nos. 97, 98, 99, 101, 102, 103, 104, 105, 106, 118, 119).

The questions, rulings and comments, to which exceptions were reserved, are as follows:

During the cross-examination of D. T. Leitch, a witness called on behalf of the defense, the following took place:

"They said something about some stagehands or something having some business with telephone girls, or something to that effect. I don't know just what they did say on that. Something about stagehands doing something, that was the way Diggs answered it. I don't know whether they were telephone girls or what they might be. I first read in the papers somewhere a reference made to telephone girls. I never talked about telephone girls that were going to Diggs' office in the conversation I had with Caminetti in the machine. I don't know that Caminetti referred to telephone girls that were going to Diggs' office in the conversation I had with him. I knew that he knew a telephone girl. I did not know her in Diggs' office. I did not know at that particular time, the early part of March, 1913, that Caminetti was accustomed to bringing telephone girls to Diggs' office. No.

Mr. HOWE. Just a moment. He says No.

The COURT. This is *not* cross-examination.

Mr. SULLIVAN. I want to show that this conversation between Diggs and Diepenbrock referred to certain telephone girls that were accustomed to being brought to Diggs' office by Caminetti.

Mr. HOWE. We object to that as immaterial, irrelevant and incompetent and not cross-examination, and *we assign it as misconduct on the part of the attorney for the Government.*

The COURT. Oh, no, don't indulge in suggestions of that kind. There is nothing in it.

Mr. HOWE. We note an exception.

The COURT. He has a right to find out what the conversation was about. This is cross-examination." * * *

"Q. Did he not in that conversation in the automobile say that the mother of a certain young girl in Sacramento had made complaint against him in the Juvenile Court.

A. No, he never said that.

Q. Did he not say that complaint had been filed against *Diggs* by the mother of a certain young girl in Sacramento, in the Juvenile Court?

A. No.

Mr. WOODWORTH. We object to that *and assign that as error*.

He did not mention the names of the girls in that conversation. I never knew of his going with any girls but these two girls. He did not mention any names." (Transcript of Record, pp. 370-371; Assignments of Error Nos. 97, 98, 99, p. 75.)

During the cross-examination of C. L. Avery, a witness called on behalf of the defense, the following occurred:

"Q. Wasn't he suspended in June and July, 1912, on account of an escapade in which he and Diggs and two young girls participated?

Mr. HOWE. That is objected to as immaterial, irrelevant, incompetent and not proper cross-examination.

The COURT. Oh, yes, you asked him about the entire period of his employment.

Mr. HOWE. We note an exception.

A. I could not testify to that. I only know—that is, I don't know, but I am led to believe, that that is the case." * * *

"Q. In June or July, 1912, did not Mr. Caminetti tell you about the circumstances which led to his suspension?

Mr. HOWE. That is objected to as immaterial, irrelevant, incompetent and not cross-examination.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.

A. No.

Mr. SULLIVAN. Q. Did anyone tell you in the presence of Caminetti about the circum-

stances which led to his suspension by the Board of Control?

Mr. HOWE. The same objection.

The COURT. The same ruling.

Mr. HOWE. We note an exception.

A. I think I overheard some comments made in the office, but no one told me directly." (Transcript of Record, pp. 373, 374; Assignments of Error Nos. 101, 103, p. 76.)

During the cross-examination of Thomas J. Ford, a witness called on behalf of the defense, the following occurred:

"Q. You remember the fact that he was suspended by the Board of Control in June or July, 1912?

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent, and not cross-examination.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.

A. Well, I remember of him being suspended, but I cannot say that it was at that particular time.

My recollection is that he was suspended once.

Mr. SULLIVAN. Q. Do you remember on one occasion when he took a trip to Oakland in a machine, an automobile, and did not show up for quite a while at the office?

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent and it is too indefinite.

Mr. SULLIVAN. That is a preliminary question. I will follow it up with another question.

The COURT. Well, I will see what it leads to. Answer it, if you remember it.

Mr. HOWE. We note an exception.

A. I have not had any knowledge of that except through general rumor.

I have no knowledge of that from what he told me. I cannot recall that I have any knowledge of that from what was said about it in the presence of Caminetti in the office of the Board of Control or elsewhere.

Q. Did you speak to him about a certain trip that he took in a machine from Sacramento to Oakland?

Mr. HOWE. The same objection, it is too indefinite as to time.

The COURT. The witness has testified upon your questioning about making some strictures to the defendant which caused him to melt into tears, and I think they have a right to ask him what he said to him.

Mr. HOWE. We note an exception.

A. No. He spoke to me about it. He spoke to me about a certain trip. I don't know when he did speak to me about it. It seems to me it was the day he got home. He spoke about being dead on his feet, that he had been riding all day.

He did not say he had gone to Oakland to see about a certain girl who was there with whom he had relations, nor did he tell me why he went to Oakland. After making that trip to Oakland he did not tell me that he had put one over on Jack Neylan, the President of the Board of Control. He did not tell me why he went to Oakland on that trip." (Transcript of Record, pp. 376-377; Assignments of Error Nos. 104, 105, 106, pp. 77, 78.)

We contend that the objections to the above questions should have been sustained and the prosecuting attorneys should have been rebuked by the trial Judge for constantly and persistently bringing to the attention of the jury the alleged improper rela-

tions, not only of the defendant Caminetti, but of Diggs, with certain "telephone girls", girls other than Lola Norris or Marsha Warrington. The entire proceeding, in this regard, was highly prejudicial to the defendant Caminetti. It will be noticed that, in the cross-examination of the witness Leitch, the Court first ruled that any inquiry as to whether Caminetti was accustomed to bringing "telephone girls" to Diggs' office, was "*not* cross-examination", and then immediately thereafter, upon the senior prosecuting attorney stating to the Court: "I want to show that this conversation between Diggs and Diepenbrock referred to certain telephone girls that were accustomed to being brought to Diggs' office by Caminetti", reversed his ruling and held that: "*This is cross-examination.*" (Transcript of Record, pp. 370-371.)

Furthermore, the trial Judge permitted a question to be asked as to whether Caminetti did not say that a "complaint had been filed against *Diggs* by the mother of a certain young girl in Sacramento, in the Juvenile Court", to which counsel for the defendant objected and assigned the asking of the question as error. (Transcript of Record, pp. 370-371.) It was manifestly improper to permit any questions to be asked with reference to alleged improper relations between Diggs and some women other than Lola Norris and Marsha Warrington. The defendant certainly could not be held responsible for the conduct of Diggs. He was on trial for his own conduct with Lola Norris and Marsha War-

rington with reference to the "White-slave traffic Act", and he was not on trial as to any other women, whether "telephone girls" or otherwise. To permit the slightest intimation to be injected into the case by the attorneys for the prosecution of the defendant's supposed relations, or of Diggs' alleged relations, with other women was highly improper and was prejudicial error.

In a previous portion of this Opening Brief, under the Sixth subdivision thereof, we pointed out that, in prosecutions of the character involved in the case at bar, it is not permissible to admit evidence of the misconduct of the defendant with females other than the one with reference to which he is charged, and we again advert to the argument there advanced and the law and authorities cited in support of the assignments of error here urged. (See pages 207-248 of this Opening Brief.)

See also, on this subject of the rulings of the trial Judge, the case of

People v. Becker, 104 N. E. 396, 402-404.

XXIV.

The Trial Court Erred in Refusing to Permit the Defendant to Testify That He Had Never Read the "White Slave Traffic Act".

(Transcript of Record, pp. 81, 82, 407; Assignments of Error Nos. 120, 121.)

We contend that the question was a proper and material one in a case like the present, involving proof of a specific intent before the defendant can be convicted. The pivotal point in the case was as to the intent and purpose of the defendant in leaving Sacramento with Lola Norris. The "White-slave traffic Act" requires the existence of a specific intent or purpose. The prosecution was in duty bound to establish this specific intent or purpose to the satisfaction of the jury beyond all reasonable doubt. The contention, advanced in support of the defense was that the defendant did not leave Sacramento with Lola Norris to go to Reno, Nevada, in interstate commerce, with the intent or purpose denounced by the "White-slave traffic Act" and alleged against him in the indictment. As the intent required by the "White-slave traffic Act" is a specific intent, the attorneys for the defendant attempted to show that the defendant could not have had the specific intent denounced by the "White-slave traffic Act" inasmuch as, among many other reasons, he had never read the "White-slave traffic Act", nor was he familiar with any of its provisions, nor had he ever heard, up to the time of his

arrest by the federal authorities, of the existence of such a law. While we concede that "it is a well-settled principle that everyone is presumed to know the law of the land, both common law and statutory, and that one's ignorance of the law furnishes no exemption from criminal responsibility for his acts", still it is equally well settled that

"an exception to the general rule exists where a specific intent is essential to a crime, and ignorance of law negatives the existence of such an intent."

Cyc., vol. 12, pp. 152; 155, 156;

Com. v. Stebbins, 8 Gray (Mass.) 492;

People v. Husband, 36 Mich. 306;

Rex. v. Hall, 3 C. & P. 409; 14 E. C. L. 635.

In this connection, we also contend that the trial Judge committed reversible error in refusing to give the following instruction requested on behalf of the defendant:

"The Court instructs the jury that where a defendant is charged with the violation of a statute which expressly requires, in order to render an act punishable, that it should be done with a specific intent or purpose or state of mind, if from ignorance of law, or from any other reason that specific intent does not exist, there is lacking one of the elements of the crime, and if you find from the evidence in this case that through ignorance of the law the defendant did not have that specific intent and state of mind charged in the indictment, it is your duty to acquit him regardless of how you view his conduct otherwise." (Transcript of Record, pp. 102, 452; Assignment of Error No. 162.)

XXV.

The Trial Court Erred in Permitting Marsha Warrington to Testify as to Her Acts of Sexual Intercourse With Maury I. Diggs, With Which the Defendant Caminetti, as Disclosed by the Evidence, Had Nothing Whatever to do and Was Not Even Aware.

(Transcript of Record, pp. 66, 67, 252, 253, 254; Assignments of Error Nos. 69, 70, 71).

We set out the objectionable questions and the testimony elicited thereby.

“Q. Was Mr. Diggs the only man that you ever had intercourse with in your life?

A. Yes——

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. Oh, I think it is a circumstance.

Mr. HOWE. We note an exception.

The COURT. She has answered the question.

Mr. ROCHE. Q. Where did that first act of intercourse take place?

A. In his office.

Q. Just state the circumstances under which that first act of intercourse took place?

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. I don't see that that is material.

Mr. ROCHE. Very well; I won't press it. I would like to ask just one question though with reference to that matter.

Q. At the time that this first act of intercourse took place between yourself and Mr. Diggs in his office, or rather, before that time, and upon that occasion, had you been furnished with any champagne?

A. Yes.

Mr. HOWE. One moment. That is objected to as immaterial, irrelevant and incompetent.

The COURT. *Yes; I think so. Well, I don't know about that. I will let the answer stand.* The evidence of the Government tends to show that it was a transaction that really was united in by these four different people—that is, I mean the history of the transaction out of which the offense is charged, and I am inclined to think that in such an instance, very similarly to the rules showing a conspiracy, that you may show all the circumstances. Proceed.

Mr. HOWE. We note an exception.

Mr. Caminetti was in the office at the time although not in the same room. Miss Norris was also in the office at the time although not in the same room.

Q. Did the four of you participate, or did the four of you partake of these wines?

A. Yes.

Mr. HOWE. That is objected to as immaterial, irrelevant and incompetent.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.

Mr. ROCHE. She has answered yes.

Mr. HOWE. I move to strike out the answer upon the same grounds.

The COURT. Motion denied.

Mr. HOWE. We note an exception.” (Transcript of Record, pp. 252-254.)

We submit that the above questions were highly improper and the replies deeply prejudicial to the defendant Caminetti. Especially is this true when it appears, from the testimony of Marsha Warrington herself, that the defendant Caminetti had nothing to do with this, or any, act of sexual intercourse between Maury I. Diggs and Marsha Warrington, and in fact, so far as the record discloses, knew nothing of this first act of intercourse at or previous to

the time of its commission. Marsha Warrington testified, on cross-examination, as follows:

“At the time I had my first sexual intercourse with Mr. Diggs at his office, myself and Mr. Diggs were in one room by ourselves. Mr. Caminetti and Miss Norris were in another room. *I did not come out and tell Mr. Caminetti what had happened. I never told him that anything had happened.*” (Transcript of Record, p. 280.)

Under this state of the record, it must be apparent that the questions should not have been permitted by the trial Judge. The theory upon which the trial Judge based his rulings admitting the above testimony is, we respectfully submit, unsound and fallacious. In the first place, the defendant Caminetti was not on trial for a conspiracy to violate provisions of the “White-slave traffic Act”. In the second place, the sexual relations existing between Maury I. Diggs and Marsha Warrington were totally foreign to the charges made against him, inasmuch as the evidence conclusively establishes that he had nothing whatever to do with the meretricious relations existing between Maury I. Diggs and Marsha Warrington, and, in fact, if we are to believe Marsha Warrington’s testimony, the defendant Caminetti was ignorant of the fact that any act of sexual intercourse had taken place between Maury I. Diggs and Marsha Warrington on the first occasion.

It is significant that the trial Judge, as to other matters, would not permit any evidence relating to

Diggs. For instance, when the defendant attempted to show, by the witness P. J. O'Brien, that the father of Marsha Warrington had threatened to kill any married man who went out with his daughter, and that this threat had been communicated both to Diggs and the defendant, the trial Judge excluded the testimony on the ground that it related to *Diggs*, and not to the defendant *Caminetti*. We set out the proceedings at length in this regard.

“Mr. HOWE. Q. I asked you if you communicated any statement to Mr. Caminetti, in the presence of Mr. Diggs, or to Mr. Diggs in the presence of Mr. Caminetti, that Mr. Warrington had made any threats against both of them?

Mr. ROCHE. That is objected to, your Honor.

The COURT. The witness has testified he made no threats against both of them.

Mr. HOWE. Well, the witness does not know whether Mr. Warrington made any threats. I asked him if he communicated that fact to the defendant and to Mr. Diggs.

The COURT. Do you assume that the witness will testify to things that did not occur?

Mr. HOWE. But he received that information from the uncle of Miss Warrington. I didn't want to ask him that because that is hearsay, but I will ask him about it.

The COURT. You may ask him what other communications he made to this defendant; let him testify to what they were.

The COURT. The objection is sustained.

Mr. HOWE. We note an exception.

Mr. HOWE. Did you communicate any such statement to the defendant Caminetti?

A. I did.

Mr. HOWE. Q. Did you communicate to Mr. Caminetti any statement that Mr. Warrington

would kill any married man that went out with his daughter Marsha?

A. Yes, sir.

Q. What did you say to him upon that subject?

A. I told him that an uncle had been in there and had said that Mr. Warrington was getting wise to Mr. Diggs, and if he ever found him with his daughter he would kill him.

Mr. ROCHE. We move that that entire testimony be stricken out upon the ground that it is hearsay.

The COURT. Let it go out. It is wholly *relevant to Diggs* as the witness states it.

Mr. HOWE. Q. Did you say anything to Mr. Caminetti to the effect that Mr. Warrington had threatened to kill any married man that might be found out with his daughter Marsha?

The COURT. You have asked him that three or four times and the witness in each instance said it was *confined to Diggs*.

Mr. HOWE. His answer was yes to that question.

The COURT. His answer was not yes. When he gave the conversation it relates *solely to Diggs*.

Mr. HOWE. But his answer was yes.

The COURT. Mr. Howe, I don't wish you to keep up a controversy with the court. I have ruled that you cannot ask the question again.

Mr. HOWE. We note an exception." (Transcript of Record, pp. 379-381.)

People v. Becker, 104 N. E. 396, 404.

The rulings of the Court, in this connection, are made the subject of Assignments of Error Nos. 107, 108; Transcript of Record, pp. 78, 379-381; and we now respectfully insist upon the objections made in the trial Court.

XXVI.

The Trial Court Erred in Permitting Marsha Warrington to Testify to Conversations She Had With Maury I. Diggs and Lola Norris not in the Presence of the Defendant Caminetti.

(Transcript of Record, pp. 67, 68, 69, 70, 273, 274, 275; Assignments of Error Nos. 73, 74, 75, 76, 78, 80, 81.)

In order to understand and appreciate the force of our assignments of error in this connection, it is necessary to set out just what transpired at the trial, as follows:

“And so he (Maury I. Diggs) said——

Mr. HOWE. I want to object to this testimony, if your Honor please, as immaterial, irrelevant and incompetent and as not being any conversation had in the presence of the defendant.

Mr. ROCHE. But this was brought out, as your Honor will recall, upon cross-examination by counsel for the defendant.

The COURT. Yes, you asked her about the trip to Jackson.

Mr. HOWE. I asked her about the trip to Jackson, but I didn't ask her anything about *any conversation* about a trip to Stockton.

The COURT. That simply comes out in her explanation as to how it came about that they were taken to Jackson.

Mr. HOWE. Well, she might explain that, but if she is to be permitted to testify to conversation not occurring in the presence of the defendant?

The COURT. If it is a part of the incident, yes, undoubtedly.

Mr. HOWE. We note an exception.

A. He said we would go to Jackson, that it would only take about 2 hours to get there and

we would be back by 11 o'clock and so we consented to go. We didn't get there until nearly 8 o'clock and so we could not get back—it was such a great distance—that we could not get back until after 12, or it might have been 1 o'clock. Had we known in the first place that it was such a long trip we would not have gone.” (Transcript of Record, pp. 273, 274.)

* * * * *

“I recall the levee conversation.

Q. When was that conversation with reference to the time that you left Sacramento?

Mr. HOWE. I object to that as immaterial, irrelevant, incompetent and not redirect examination.

Mr. ROCHE. I think there was some little confusion in the record about that matter, your Honor, and I simply desire to have the matter straightened out.

Mr. HOWE. She was asked to relate all the conversation that occurred during those two weeks.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.” (Transcript of Record, pp. 274, 275.)

* * * * *

“Mr. ROCHE. Q. What was said in that conversation about Mr. Diggs leaving Sacramento, and when?

Mr. HOWE. That is objected to as immaterial, irrelevant, incompetent and not redirect.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.

A. He said he would either leave that night or early the next morning.

Mr. ROCHE. What do you mean by that, that he was going to leave that night or the next morning?

A. Yes.

Q. When you left him that night was there anything said between you as to when you would see him again?

Mr. HOWE. The same objection, leading and suggestive.

Mr. ROCHE. Q. What was said when you left him that night?

Said objection overruled by the Court.

Mr. HOWE. We note an exception.

Mr. ROCHE. Mr. Reporter, will you please read the question? (Question repeated by the Reporter.)

A. No, he did not say when he would return.

Q. What did you say to him when you were leaving him?

A. I told him good-bye, because I expected he was going.

Q. When did you next see or hear from Mr. Diggs?

Mr. HOWE. That is objected to as not re-direct examination. The matter was thoroughly gone into in the original case, if your Honor please.

The COURT. The objection is overruled.

Mr. HOWE. We note an exception.

A. He telephoned to me the next morning and told me he had not gone.

That was the first knowledge I had acquired that he had not gone. This levee conversation was held on Saturday night." (Transcript of Record, pp. 275, 276.)

"Mr. Diggs and I were alone at the levee conversation. Mr. Caminetti was not there." (Transcript of Record, p. 262.)

The defendant Caminetti was not present at any of these interviews or conversations between Maury I. Diggs and Marsha Warrington, and the trial Judge should not have permitted the introduction of this testimony. It is elementary law that a person accused of crime cannot be bound by the statements made by others without his presence and of which he was unaware.

XXVII.

The Trial Court Erred in Refusing to Permit a Witness Called on Behalf of the Defendant to Testify as to Whether Miss Warrington Did Not Appear Worried or Excited When the Witness Had a Conversation With Her With Reference to a Publication in the Newspaper in Sacramento, the "Bee".

(Transcript of Record, pp. 74, 364; Assignment of Error No. 95).

The proceeding was as follows:

"Q. How did Miss Warrington appear at that time, as to whether or not she was worried or excited, when you had this conversation with her with reference to the publication in the 'Bee'?"

Mr. SULLIVAN. We object to that as immaterial.

The COURT. The objection is sustained.

Mr. HOWE. We note an exception." (Transcript of Record, p. 364.)

We submit that the above question was proper and should have been answered. It was intended to throw light upon the intent and purpose of the defendant in leaving Sacramento in the company of the two young ladies and Maury I. Diggs. It was intended to elicit corroboration of the contention of the defense that the chief motive of the defendant Caminetti and of Miss Warrington in leaving Sacramento was to avoid impending scandal and disgrace and notoriety which they believed, and the others believed, were about to fall upon them as well as threatened publications in a Sacramento newspaper; an intent and purpose entirely inconsistent, obviously, with that denounced by the "White-slave traffic Act" and charged against the defendant in the indictment.

XXVIII.

The Trial Court Erred in Refusing to Permit a Witness Called on Behalf of the Defendant to Testify as to the Effect Upon the Defendant of a Conversation He Had Had With the Defendant.

(Transcript of Record, pp. 75, 371, 372; Assignment of Error No. 100).

On redirect examination, the witness D. T. Leitch, called on behalf of the defendant, was asked:

“Mr. HOWE. Q. What effect did that conversation seem to have upon him?

Mr. SULLIVAN. We object to the question as immaterial and calling for the conclusion of the witness.

The COURT. The objection is sustained.

Mr. HOWE. If your Honor please, the purpose is to show that he was excited and nervous and worried after the conversation or warnings given him by Mr. Diepenbrock.

The COURT. I am aware of what the purpose is.

Mr. HOWE. We note an exception.” (Transcript of Record, pp. 371, 372.)

It is respectfully submitted that the above question should have been permitted by the trial Judge. The same argument that we have heretofore advanced in this Opening Brief, as to the evidence admissible to show the real intent and purpose of the defendant Caminetti in leaving Sacramento, is applicable here.

XXIX.

The Trial Court Erred in Permitting Evidence to go to the Jury With Reference to the Amount of Salary Due the Defendant When He Left Sacramento and Some Moneys That Were Then Due by Him to the Witness O'Brien, Called on Behalf of the Defendant.

(Transcript of Record, pp. 55, 56, 57, 196, 197, 198, 383, 384; Assignments of Errors Nos. 40, 41, 42, 43, 109, 110, 111, 112, 113, 114).

We respectfully contend that all this evidence, as disclosed by the assignments of error, about the condition of the salary due to the defendant at the time he left Sacramento and his private loans with the witness O'Brien were utterly immaterial, incompetent and irrelevant for any purpose in the case.

XXX.

The Trial Court Erred in Admitting Much Extraneous and Remote Matter, Prejudicial to the Defendant.

(Transcript of Record, pp. 55, 58, 60, 61, 62, 194, 202, 203, 205, 206, 207, 208, 209, 219; Assignments of Error Nos. 38, 39, 45, 46, 49, 50, 51, 52, 53, 54, 55, 61).

The assignments of error set forth the extraneous and remote matters, which we deemed to be wholly incompetent, irrelevant and immaterial.

It would unnecessarily prolong this already too lengthy Opening Brief, to take up each assignment and discuss the errors in detail. Suffice it to say that a perusal of the objectionable matters, permitted by the trial Judge to be introduced in evidence, will show that they related to the purchase of groceries, while the defendant stayed for three days in the bungalow at Reno; to the sale of the groceries, upon his arrest by the state authorities at Sacramento, California; to the condition of the bungalow, immediately previous to its occupancy by the defendant and during his sojourn and upon his departure, and even for some time thereafter.

Not only were all these matters entirely too remote, but they were incompetent, irrelevant and immaterial, for the reason that there was no proper foundation for their admission. We contended, throughout the trial of the case, that before any such proof was admissible, if admissible at all, the prosecution was in duty bound to submit some evi-

dence that the defendant Caminetti had committed some act to transport, or cause to be transported, or aid or assist in transporting Lola Norris or Marsha Warrington, in interstate commerce, from Sacramento, California, to Reno, Nevada. In the absence of any such evidence, and in view of the meagre showing by the prosecution, we respectfully submit that the evidence above referred to, and objected to by the attorneys for the defendant at the trial, should have been excluded and that its admission was error and prejudicial to the defendant.

XXXI.

The Trial Court Erred in Admitting the Testimony With Reference to the Sale of Railroad Tickets and in Admitting the Railroad Tickets Themselves.

(Transcript of Record, pp. 49, 50; Assignments of Errors Nos. 18, 20, 22).

We contend that any reference or testimony to railroad tickets, or the tickets themselves, was inadmissible until the prosecution had offered some evidence showing, or tending to show, that the defendant had committed some act to transport, or cause to transport, or aid or assist in transporting, in interstate commerce, Lola Norris or Marsha Warrington from Sacramento, California, to Reno, Nevada. As already previously argued in this Opening Brief, there is absolutely no evidence that the defendant Caminetti had anything to do with the purchase of the tickets or that he contributed to them in any way, shape or form.

XXXII.

The Trial Court Erred in Admitting Certain Statements Made by Maury I. Diggs, and Which Were Prejudicial to the Defendant Caminetti.

(Transcript of Record, p. 64; Assignments of Error No. 63).

The objectionable questions and answers were as follows:

“Q. What, if anything, did Maury I. Diggs say about it?

Mr. WOODWORTH. We object to that as immaterial, irrelevant and incompetent and in no way binding on this defendant.

The COURT. Q. Was it in the presence of the defendant?

A. Yes, sir.

Mr. WOODWORTH. We note an exception.

Mr. ROCHE. Q. And also in his hearing?

A. Yes, sir.

Q. What was the statement?

A. On the way to the police station from the bungalow, Maury I. Diggs stated that he hoped the Sacramento officers would place him in a strong box when he got to Sacramento, that he was afraid old man Warrington would get him.” (Transcript of Record, p. 222.)

Another objectionable question and answer was as follows:

“Q. What was said by Mr. Diggs to the two girls at that time?

Mr. WOODWORTH. We again object to that statement as immaterial, irrelevant and incompetent, no proper foundation laid and not binding on this defendant.

The COURT. The objection is overruled. The evidence tends to show Mr. Woodworth, that

this was a transaction in which four people were engaged, the defendant and another man and these two girls; of course, under such circumstances the declaration of any one of them made in the presence of the other may be permitted to go before the jury, all the circumstances being shown, and the jury will determine whether or not what was said affects the others by ascertaining whether any denial of the declaration was made, and the other circumstances which would tend to show whether the declaration of the one was intended to imply an understanding of the others as to what the transaction involved. In such a case it is very much like a prosecution for conspiracy, only here of course it is admitted simply because and only because it is made in the presence of the defendant—made either by or in the presence of a defendant. The law is that you may give such declaration in evidence and then if it appears that the defendant remains silent, or that he acquiesced, it will be taken as evidence tending to connect him with the transaction; it is not conclusive at all but it all goes to the jury for their consideration.

MR. WOODWORTH. The point we make is that the defendant is indicted here simply for having violated the White Slave Traffic Act. He is not indicted for conspiracy.

THE COURT. Mr. Woodworth, I understand the situation thoroughly and I have ruled. I never permit a discussion after I have ruled. I cannot do it because it takes too much time.

MR. WOODWORTH. We take an exception to the ruling and to the reasons stated by the Court.

A. Mr. Diggs said to the two girls 'It is up to you girls now whether we go to the pen, or not.'

MR. ROCHE. Q. And what, if anything, did Mr. Caminetti say?

Mr. WOODWORTH. One moment. I move to strike out the answer upon the same grounds.

The COURT. The motion is denied.

Mr. WOODWORTH. An exception.

A. Mr. Caminetti said 'That is right, girls.'

Mr. ROCHE. Q. And what, if anything, did the two girls say?

A. I don't know which one of them said it, but one said, 'We will stay with you, we will stay by you.' " (Transcript of Record, pp. 216-218; Assignments of Error Nos. 58, 59, p. 63.)

Not only do we contend that the questions asked and the answers elicited were improper, but the theory of the learned trial Judge to the effect that the case at bar was "very much like a prosecution for conspiracy", was erroneous and prejudicial to the defendant. It resulted in the admission of much testimony and evidence that otherwise would never have been admitted. It practically made the defendant Caminetti responsible for all of the acts and statements of Maury I. Diggs and of Lola Norris and Marsha Warrington. It was a radically wrong theory and must have produced in the minds of the jury "confusion worse confounded".

XXXIII.

The Trial Judge Erred in Making a Remark in the Presence of the Jury Deemed to be Improper and to Which Exception Was Taken.

(Transcript of Record, pp. 54, 55, 187; Assignment of Error No. 36).

The remarks of the trial Judge arose as follows:

“Q. Is it a fashionable district or otherwise?”

The COURT. What is the object of this sort of examination?

Mr. WOODWORTH. Counsel will probably contend, may it please the Court, that this was a house away off in the suburbs, all by itself, where these people were in hiding. We desire to show that they were not in hiding at all.

The COURT. *That they were not ashamed.*

Mr. WOODWORTH. We object to the remark of the court and assign that as error.” (Transcript of Record, p. 187.)

We respectfully submit that the remarks made by the trial Judge were prejudicial to the defendant and were unjustified and constitute reversible error.

XXXIV.

The Court Erred in Not Granting the Motion Made on Behalf of the Defendant at the Outset of the Case to Transfer the Trial of the Case to Sacramento, Where the Offenses Were Charged in the Indictment to Have Occurred and Where the Defendant and the Principal Witnesses all Resided.

(Transcript of Record, pp. 48, 143, 147, 148-150, 151; Assignment of Error No. 16).

This motion was made at the proper time and in fact, at the earliest possible stage of the case. While a matter addressed to the sound discretion of the trial Judge, still, in view of the showing made, the motion to transfer should have been granted.

Section 72 of the Judicial Code provides:

“The State of California is divided into two districts, to be known as the Northern and Southern Districts of California. * * * Terms of the District Court for the Northern District shall be held at San Francisco on the first Monday of March, and the second Monday in July, and the first Monday in November; *at Sacramento* on the second Monday in April; and at Eureka on the 3rd Monday in July.”

It was under this section that the defendant Caminetti appealed to the Court to transfer the trial to Sacramento.

The record shows that on July 30, 1913, the defendant was “*first* called for arraignment”. (Transcript of Record, p. 143.) On that day, a demurrer was interposed and one of the grounds urged was

that the defendant should be tried in Sacramento, the place alleged in the indictment where the offenses were committed and where the defendant and the principal witnesses both for the prosecution and the defense resided. The trial Judge was perfectly correct in holding that the motion to transfer the trial to Sacramento was not a ground of demurrer and we acquiesced in his decision upon that point. (Transcript of Record, pp. 143-144.) However, upon that day (July 30, 1913), we advised the Court that we would reserve the right, before the trial came on, "to make a proper showing to the Court for the purpose of trying the case at the place where the crime was alleged to have been committed". And the Court ruled: "Let that be the order." (Transcript of Record, p. 147.) Thereafter, on August 5, 1913, and a considerable time before the trial of the case (which was commenced on August 26, 1913), counsel for the defendant renewed the motion to transfer the case to Sacramento for the purposes of trial. The following proceedings took place in that regard:

"The defendant, F. Drew Caminetti, thereupon moved the Court to transfer the case for trial to Sacramento, in the State of California. The Court thereupon stated that the motion would be ruled upon at the time the case was called.

'Mr. WOODWORTH. *But we desire the record to show we made the motion at this time.*'

The Court thereupon stated to counsel for defendant that he could then file the affidavit of the defendant, F. Drew Caminetti, in sup-

port of the motion so that the defendant would be regarded as having made the motion as of this date, viz.: August 5, 1913." (Transcript of Record, p. 147.)

Thereafter, when the case was called for trial in San Francisco, the attorneys for the defendant again renewed the motion to transfer the case to Sacramento for trial, which the trial Judge, after due consideration, denied, and to which exception was taken and this assignment of error now urged. (Transcript of Record, pp. 148, 151.)

The affidavit of the defendant Caminetti, filed in support of the motion to transfer the trial, omitting the caption and attestation, etc., is as follows:

"That he is the defendant in the above entitled action; that the indictment contains four counts; that in each count, the offense is alleged to have been committed by the defendant at Sacramento, State and Northern District of California; that, under and by virtue of Section 72 of the Judicial Code of the United States,— 'terms of the District Court for the Northern District of California shall be held..... At Sacramento on the second Monday in April.'

That this defendant now respectfully demands to be tried at Sacramento, State and Northern District of California; that he invokes his constitutional right to be tried at the place where the offenses are alleged to have been committed, and by the Court duly authorized by law to hold Court at said place where the said alleged offenses are charged to have been committed; that he desires to be tried by a jury selected from the vicinage of the place where said offenses are alleged to have been

committed; that he has a meritorious defense to said accusations made against him;

That his residence, home, and place of business have been, and now are, at Sacramento, State and Northern District of California, and not at San Francisco, where it is proposed now to try him; that most of his relatives and immediate members of his family, friends and acquaintances live in and around Sacramento, California, and not at San Francisco; that to compel him to be tried in San Francisco, California, will greatly and seriously and materially hinder, embarrass and jeopardize the defendant's rights and such defenses as he may deem proper to present, and as this defendant verily believes, and is informed by his counsel, and therefore avers, will deprive him and prevent him from properly and adequately and fully presenting his defense to said charges, and, in that behalf, this defendant deposes that he is without sufficient means to defray the expenses absolutely necessary to subpoena witnesses from Sacramento, California, and elsewhere, to San Francisco; that most of the witnesses required by this defendant to properly present his defenses, reside in Sacramento, California; that they are about 20 in number; that, as this defendant is informed and believes the material witnesses, upon whose testimony the Government relies, live in Sacramento, California; that it would save great expense to the Government, and to the defendant in so far as the presence of witnesses is required, by trying the case in Sacramento, and not at San Francisco; that for the convenience of witnesses, both for the Government and the defendant, and to save great and unnecessary expense, the place of trial of this defendant should be held at Sacramento, and not at San Francisco; that this defendant is absolutely without means to subpoena witnesses from Sac-

ramento, and elsewhere, to San Francisco, and to pay for their transportation, maintenance and subsistence during the pendency of this trial, which, as this defendant is informed and believes, will require at least one week, or ten days; that unless the trial is held at Sacramento instead of San Francisco, this defendant will be deprived of a fair and impartial trial, and denied due process of law, and his liberty jeopardized, and he will be unable to make proper defense to said offenses, and he might be convicted of offenses of which he is not guilty." (Transcript of Record, pp. 149, 150.)

The prosecution did not attempt to make a counter showing. Therefore, the statements of fact contained in the affidavit of the defendant Caminetti must be accepted as true, and, under the showing therein made, the trial Judge should have granted the motion to transfer the trial of the case from San Francisco to Sacramento. The indictment alleged that the offenses were committed in Sacramento. The defendant and his family resided in Sacramento. The principal witnesses for the prosecution, Marsha Warrington and Lola Norris and others, resided in Sacramento. Almost every witness called on behalf of the defendant, as a perusal of the transcript of record will show, resided in Sacramento.

Section 72 of the Judicial Code was an express provision by Congress that Court should be held at Sacramento. It was undoubtedly the purpose of the law that all crimes and offenses committed at or near Sacramento should be tried there. This

provision was enacted in the interests of convenience and economy on the part of the government as well as of a defendant, and also in the interests of justice and so as not unnecessarily to harass or jeopardize a defendant's rights by compelling him to go to a distant part of a state (for instance such as is the large State of California), for trial and at great expense to bring his witnesses from their homes to testify. It is fundamental in English and American jurisprudence that one accused of crime is entitled to be tried by a jury selected from the vicinage of the place where the crime is alleged to have been committed. We understand that in other judicial districts motions to transfer for trial are granted as a matter of course. As above stated, the prosecution attempted no counter showing whatever. It is respectfully submitted that the defendant was unreasonably handicapped in his defense in being compelled to go to trial in San Francisco instead of Sacramento, and, as stated in his affidavit, was "deprived of a fair and impartial trial, and denied due process of law, and his liberty jeopardized and he (was) unable to make proper defense to said offenses". (Transcript of Record, p. 150.) There was no substantial reason to justify the trial Judge in refusing to grant the motion to transfer the trial of the case. The offenses charged, if they were committed at all, took place, as alleged in the indictment, *at Sacramento*. The defendant and his family and all his principal witnesses lived *in Sacramento*. The principal wit-

nesses for the prosecution lived *in Sacramento*. Those that did not, lived in Reno, Nevada, and it was certainly in the interests of economy to the government and also of time that the trial should have taken place *at Sacramento* instead of San Francisco, as Reno is nearer Sacramento than it is to San Francisco by one hundred miles. Considering the averments of the indictment and the allegations of the affidavit of the defendant, which were not denied or controverted by the prosecution, it is respectfully submitted that the trial Judge abused the discretion reposed in him in not granting, upon the mere timely suggestion of the attorneys for the defendant, the motion to transfer the trial of the case from San Francisco to Sacramento.

Section 7 of the bill of rights in the state constitution of 1879 provides that: "The right of trial by jury shall be secured to all, and remain inviolate." This means the right as it existed at common law, and includes *the right to be tried in the county where the crime is charged to have been committed, as well as to having a jury of the vicinage*.

People v. Powell, 87 Cal. 348; 25 Pac. 481.

Conclusion.

In conclusion, we feel that while we owe this Honorable Appellate Tribunal an apology for the length of this Opening Brief, still a perusal of the Transcript of Record, we believe, will justify us in this extended argument. The importance of this case to the defendant and to the immediate members of his family as well as the sincere and conscientious belief of his counsel in his innocence of any wilful, knowing, or felonious violation of any of the provisions of the "White-slave traffic Act" have compelled us, in the interests of justice, to make the above elaborate and painstaking presentation of our views.

The fact, further, that the case seems to be regarded by bench and bar as one *prima impressionis*, in view of the very broad scope and operation of the "White-slave traffic Act" contended for by the prosecution, also impelled us to make a more minute and laborious investigation and argument of the subject than we otherwise would have done, and we crave the indulgence of this Honorable Appellate Tribunal, if we have trespassed too much upon its time and patience.

We have to observe, in closing, that the "White-slave traffic Act" was intended to prohibit the importation of girls and women from foreign countries into the United States, and between the States, for the purposes of commercial prostitution or other forms of commercialized vice. What the Act

aims at is the business or commerce of prostitution and vice, and not cases of private immorality where there is no element of gain or commerce or business. We are not to be understood, for an instant, as commending private immorality, nor apologizing for the defendant Caminetti, as disclosed by the record in this case, but the United States must, and should, leave such cases of private immorality, disassociated from any element of gain or commerce or business, to the regulation of the several states in which such private immorality takes place.

The case at bar, confessedly, involves no feature of gain or commerce or business. It was the rash act of a young man who had no thought of violating any law of the United States. To place him on a level with the professional procurer and to stigmatize him and his innocent children with the terrible taint of "White Slavery" is to commit a crime, we submit, respectfully, worse than any that he may have committed.

He should be dealt with by the local Courts in Sacramento, California, or in Nevada, which are competent to administer justice, and in which, if convicted, he would not have to bear through all his life, and his children after him, the horrible name of having been a "White-slaver".

Indulging in every presumption against the defendant, the worst that he did was to engage in a wild and foolish escapade. The hot blood of youth overcame, not only his judgment, but that of Lola

Norris. The defendant does not belong to the criminal class and he should not be condemned to lasting infamy, but given a chance to redeem himself and become a useful citizen. He should be restored to his family, who have forgiven him. He should be allowed to support his wife and children, as he is now doing, and not be made a criminal upon such a record as is exhibited in the case at bar.

We submit that, in the first place, the judgment of conviction should be reversed and the defendant discharged and permitted to go hence without day upon the ground that (a) the "White-slave traffic Act" is unconstitutional; or (b) that the facts alleged and proved by the prosecution, assuming them all to be true, do not make out such a case as it was the intent and purpose of the "White-slave traffic Act" to cover and punish.

Should this Honorable Appellate Tribunal take the view, contended for by us, as to either one or both of the two above propositions, then, of course, it will be unnecessary to consider the other numerous remaining points advanced by us in support of a new trial.

Should this Court not agree with the contentions made by us, which would result in the complete discharge of the defendant, then we confidently rely upon the errors committed by the trial Judge, entitling this defendant, at least, to a new trial.

In this connection, it is confidently contended that the legal objections urged are sufficient to justify a new trial because of the errors of law committed by

the trial Judge, the insufficiency of the evidence to sustain the verdict, and the utter paucity of the proof to bring the defendant within the letter or spirit of the "White-slave traffic Act."

Finally, it is vigorously and bravely urged that, upon a reading of the entire record, this Honorable Appellate Tribunal will come to the conclusion that the defendant did not have a fair and impartial hearing before the trial Judge.

As said by the Circuit Court of Appeals for the Eighth Circuit in the case of *Pettine v. Terr.* of New Mex., 201 Fed. 489, 494, 497:

"Under the Constitution of the United States, the defendant had the right to a fair and impartial trial of the issues of his guilt or innocence by a jury of his peers without error of law and according to the course of the common law. He had the right to an acquittal of the charge against him unless the legal evidence satisfied the jury, not the Appellate Court, of his guilt beyond a reasonable doubt." * * *

"In criminal cases, where the life, or as in this case the liberty, of the defendant for the probable remainder of his natural life is at stake the Courts of the United States in the exercise of a sound discretion may notice grave errors in the trial of a defendant although the questions they present were not properly raised in the trial court by request, objection, or exception."

Citing:

Wiborg v. United States, 163 U. S. 632, 658,
16 Sup. Ct. 1127, 1197, 41 L. Ed. 289;

Clyatt v. United States, 197 U. S. 207, 221,
25 Sup. Ct. 429, 49 L. Ed. 726;

Crawford v. United States, 212 U. S. 183, 194,
29 Sup. Ct. 260, 53 L. Ed. 465; 15 Ann. Cas.
392;

Weems v. United States, 217 U. S. 349, 362,
30 Sup. Ct. 544, 54 L. Ed. 793; 19 Ann. Cas.
705;

Williams v. United States, 158 Fed. 30, 36, 88
C. C. A. 296, 302;

Humes v. United States, 182 Fed. 485, 486,
105 C. C. A. 158, 159;

People v. Becker, 104 N. E. Rep. 396.

The case just cited, of *People v. Becker*, contains what we deem to be most apposite statements of the law, which should govern the trial Judge in presiding over a criminal trial, for the purpose of securing to one accused of crime a fair and impartial trial. The Court of Appeals of New York used the following pertinent and significant language:

“The rule of discretion to which we have referred as abiding with a trial judge rests for its foundation upon the conception of a judgment exercised at every stage with open mind, fairly and impartially and in the interest of exact justice between people and accused, and when we find extending throughout a trial a series of rulings so repeatedly and consistently adverse to one side even upon reasonable requests as to indicate that the trial judge has yielded, however unconsciously, to a feeling of hostility and with whatever praiseworthy motives to the thought that presumptively justice will be best subserved by generally and constantly denying the requests of one side, we must conclude that there has been a loss of that open-minded discretion and well-balanced judgment which the

law contemplates, and the party who has been injured by such abandonment is entitled to relief. It is at once a compliment and a heavy responsibility, the influence which an able and forceful trial judge may exert in a case of life and death on the minds of jurymen who are alert to discover the impressions produced upon his more experienced mind by the course of the trial, and when his attitude, although unintentionally, seems to portray hostility to and disapproval of one side there can but result an impairment of that free and unbiased verdict which under our system of jurisprudence is regarded as essential to the administration of justice.

“The fundamental demand of our law is that the accused shall have a fair trial, and if that right has been infringed, not in respect to mere technicalities, but in substantial matters, and however undesignedly, he shall have another opportunity to meet his accuser and establish his innocence. That in our opinion is the present case. Under the rulings of the court the defendant did not have that manner of trial which the law guaranteed to him. His counsel was hampered and embarrassed; his case was discredited and weakened; full and impartial consideration by the jury was impeded and prevented. He never had a fair chance to defend his life, and it would be a lasting reproach to the state if under those circumstances it should exact its forfeiture. *People v. Wood*, 126 N. Y. 249, 269. 27 N. E. 362; *People v. Barberi*, 149 N. Y. 256, 43 N. E. 635, 52 Am. St. Rep. 717; *People v. Davey*, 179 N. Y. 345, 347, 72 N. E. 244; *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592; *People v. Freeman*, 203 N. Y. 267, 271, 96 N. E. 413; *People v. Kinney*, 202 N. Y. 389, 397, 95 N. E. 756.

“The principle of what was written by Judge Werner in the *Davey* case, although said under

other circumstances and in the case of a different crime than murder, is cogently applicable. The case was one where from the nature of the offense charged some of those feelings of popular prejudice and passion were liable to be aroused which it is contended were not lacking in the present case. He wrote: 'There are cases, however, to which apparently technical errors may be so prejudicial as to produce the gravest injustice. This may be particularly true of a case in which a defendant, accused of an abhorrent and detestable crime, finds himself confronted at the very threshold of the courtroom, with that subtle, pervasive, and almost ineradicable prejudice which the bare charge of such a crime may engender against him, in the minds of those who are to pass upon his guilt or innocence. * * * In such cases reason needs to be safeguarded from prejudice by everything that caution and justice can suggest. * * * so that jurors may, as far as possible, be unbiased and impartial.'

"And as was again said by Judge Vann in *People v. Wolf*: 'An unfair trial, especially in a criminal case, is a reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but also upon the trial judge. However strong the evidence against the defendant may be, if she did not have a fair trial, as shown by the rulings of the court. * * * the judgment of conviction should be reversed and a new trial ordered so that she may be tried according to law.' 183 N. Y. page 472, 76 N. E. page 594."

That serious errors, justifying a new trial, were committed by the trial Judge, is, we respectfully submit, clearly revealed by the record. As was well said by the Circuit Court of Appeals for the Eighth

Circuit, in the case of *Pettine v. Terr. of New Mex.*,
supra (at page 492):

“The legal presumption is that error produces prejudice, and it is only when the fact so clearly appears as to be beyond doubt that an error challenged did not prejudice, and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable.”

Citing:

Deery v. Cray, 5 Wall. 795, 807, 808, 18 L. Ed. 653;

Peck v. Heurick, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302;

Smith v. Shoemaker, 17 Wall. 630, 639, 21 L. Ed. 717;

Moore v. Bank, 104 U. S. 625, 630, 26 L. Ed. 870;

Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62;

Railroad Co. v. O'Brien, 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299;

Mexia v. Oliver, 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602;

Railroad Co. v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006;

Railroad Co. v. McClurg, 8 C. C. A. 322, 325, 326, 59 Fed. 860, 863;

Association v. Shryock, 20 C. C. A. 3, 11, 73 Fed. 774, 781;

Railroad Co. v. Holloway, 52 C. C. A. 260, 114 Fed. 458;

Armour & Co. v. Russell, 75 C. C. A. 416, 144
 Fed. 614, 615, 6 L. R. A. (N. S.) 602;
 People v. Becker, 104 N. E. Rep. 396.

Moreover, in a case like the one at bar, where the evidence against the defendant is "so meagre and so remote," it is the well settled rule that an appellate tribunal will be more exacting and critical in scrutinizing, and more inclined to reverse, the rulings of a trial Judge and grant a new trial, than it would be in a case where the evidence against a defendant is strong or overwhelming.

As said by this Honorable Court, in another very recent case of Peterson v. United States, 213 Fed. 920, 923:

"In the main, we do not find the language used by the lower court objectionable, and we should hesitate to grant a reversal upon this ground alone, *if the record disclosed strong incriminating evidence*, but the circumstances relied upon are *so meagre and so remote that we are constrained to think that the defendant was prejudiced in his rights.*"

Before this Appellate Tribunal can affirm the judgment of conviction now standing against the defendant, it must be "*able to say with certainty*", "*that the defendant was not prejudiced*" by the rulings, remarks and instructions complained of by the defendant.

To use the apposite language of the Circuit Court of Appeals for the Eighth Circuit, in the case of Balliet v. United States, 129 Fed. Rep. 689, 696:

“Moreover, we are not able to say with certainty, as we must be to uphold the verdict, that the defendant was not prejudiced by the instruction.”

Dated, San Francisco,

October 19, 1914.

Respectfully submitted,

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APPENDIX.

ACT OF JUNE 25, 1910 (36 Stat., 825).

An Act to further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, and the term "foreign commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the District of Columbia.

SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist

in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether

with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court.

SEC. 5. That any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or from, through, or into which any such woman or girl may have been carried or transported as a passenger in interstate or foreign commerce, or in any Territory or the District of Columbia, contrary to the provisions of any of said sections.

SEC. 6. That for the purpose of regulating and preventing the transportation in foreign commerce of alien women and girls for purposes of prostitution and debauchery, and in pursuance of and for the purpose of carrying out the terms of the agreement or project of arrangement for the suppression of the white-slave traffic, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris conference and confirmed by a formal agreement signed at Paris on May eighteenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight, as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight, the Commissioner General of Immigration is hereby designated as the authority of the United States to receive and centralize information concerning the procurement of alien women and girls with a view to their debauchery, and to exercise supervision over such alien women and girls, receive their dec-

larations, establish their identity, and ascertain from them who induced them to leave their native countries, respectively; and it shall be the duty of said Commissioner General of Immigration to receive and keep on file in his office the statements and declarations which may be made by such alien women and girls, and those which are hereinafter required pertaining to such alien women and girls engaged in prostitution or debauchery in this country, and to furnish receipts for such statements and declarations provided for in this Act to the persons, respectively, making and filing them.

Every person who shall keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any country, party to the said arrangement for the suppression of the white-slave traffic, shall file with the Commissioner General of Immigration a statement in writing setting forth the name of such alien woman or girl, the place at which she is kept, and all facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parentage, and concerning her procurement to come to this country within the knowledge of such person, and any person who shall fail within thirty days after such person shall commence to keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman

or girl within three years after she shall have entered the United States from any of the countries, party to the said arrangement for the suppression of the white-slave traffic, to file such statement concerning such alien woman or girl with the Commissioner General of Immigration, or who shall knowingly and willfully state falsely or fail to disclose in such statement any fact within his knowledge or belief with reference to the age, nationality, or parentage of any such alien woman or girl, or concerning her procurement to come to this country, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than two thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment, in the discretion of the court.

In any prosecution brought under this section, if it appear that any such statement required is not on file in the office of the Commissioner General of Immigration, the person whose duty it shall be to file such statement shall be presumed to have failed to file said statement, as herein required, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement, as required by this section, on the ground or for the reason that the statement so required by him, or the information therein contained, might tend to criminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture under any law

of the United States for or on account of any transaction, matter, or thing, concerning which he may truthfully report in such statement, as required by the provisions of this section.

SEC. 7. That the term "Territory," as used in this Act, shall include the district of Alaska, the insular possessions of the United States, and the Canal Zone. The word "person," as used in this Act, shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person, acting for or employed by any other person or by any corporation, company, society, or association within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such other person, or of such company, corporation, society, or association, as well as that of the person himself.

SEC. 8. That this Act shall be known and referred to as the "White-slave traffic Act."

Approved, June 25, 1910.

Does the "White Slave Traffic Act" Apply to a Man Who
Transports a Woman from One State to Another for
the Purpose of Having Sexual Intercourse With Such
Woman Himself, There Being No Commercial Element
in the Transaction?

2405
No. 2045

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. DREW CAMINETTI,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

ORAL ARGUMENT OF J. A. COOPER
ON BEHALF OF PLAINTIFF IN ERROR.

Filed this.....day of November, 1914.

FRANK D. MONCKTON, Clerk

By.....Deputy Clerk.

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Preliminary Statement as to the Facts.

The defendant was indicted for transporting and causing to be transported "in interstate commerce from Sacramento, in the State of California, to Reno, in the State of Nevada, over the lines of the Southern Pacific Railroad, a certain girl, Lola Norris, for an immoral purpose, to wit, that she should become the concubine and mistress of defendant". He was found guilty upon this count of the indictment, the jury returning a verdict of not guilty upon every other ground. The evidence entirely frees the defendant from any imputation that he transported, or caused to be transported, the girl Lola

Norris for the purpose of placing her in a house of prostitution, or for any other purpose than for his own pleasure, and her pleasure, and their personal relations with each other. Lola Norris, the prosecutor's witness, testified, "Mr. Caminetti did not in any of these conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose that I should go from Sacramento to Reno for the purpose of being his mistress." The trial Judge, in passing sentence, stated that the offense fell "below the deliberate traffic in human souls,—that is, inducing girls to enter, or deliberately putting them into houses of prostitution for purposes of gain. You are free from any such imputation arising from the evidence, and I cannot, therefore, assume that such idea ever entered into your consideration". The Court further stated in passing sentence, "If the question of my power were a clear one, I would have a very strong inclination to save you from the public obloquy that comes from incarceration in the penitentiary."

Nevertheless, the defendant was sentenced to a term of 18 months in the Federal Penitentiary and to pay a fine of \$1500.00. From the judgment, this appeal is prosecuted. We call the Court's particular attention to the fact that the acts of defendant in this case would not constitute a crime under the laws of this State, nor under the laws of any State in the Union. He would be guilty of no crime under

the common law, nor under the civil law. He would be guilty of no crime under the law of any civilized country. No such crime was ever imputed to Lord Nelson and Lady Hamilton, to Pericles and Aspasia, or to Victor Hugo, and the faithful and trusted companion of his pleasures and comforter in his sorrows. Therefore, I desire to earnestly and carefully call the attention of the Court to the statute under which this defendant was convicted and to the legal interpretation thereof.

**The Statute Which it is Claimed Has Been Violated
By this Defendant.**

The Act of June 25, 1910, called the "White Slave Traffic Act", provides as follows:

"That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or *debauchery*, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign com-

merce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court."

(See Act in full, appendix to opening brief.)

In the determination of the question as to whether or not the defendant is guilty under the Act, the subject may be divided logically into the following heads:

First:

Was it the intention of Congress that the Act should apply to a personal escapade?

Second:

What is the legal interpretation of the Act?

Third:

Has the Act been held to apply to a case like this by the Supreme Court of the United States?

These we will take up in the order named.

**FIRST: WAS IT THE INTENTION OF CONGRESS THAT THE
ACT SHOULD APPLY TO A PERSONAL ESCAPE?**

Historical Development of the Act.

In this connection, the historical development of the law in connection with crimes committed by persons or corporations transporting women for the purpose of prostitution may be interesting. The first law on this subject was passed in March, 1875 (18 Stat. L. 477; 1 U. S. Comp. St. pp. 1286-7). This Act made it a felony to knowingly and willfully import women into the United States for the "purpose of prostitution". It was superseded by the Act of March, 1903 (32 Stat. L. 1213, 1905 Supp. to U. S. Comp. Stat. 276). The latter Act contained the principal provisions of the first, but was broader in its scope. It included "any woman or girl". It also left out the words "knowingly and willfully". The Act, however, remained in principle the same as before, its object being to prevent the importation of any woman or girl for the "purpose of prostitution". The penalty remained the same. Both these Acts were repealed and superseded by the Act of February 20, 1907, entitled "An Act to Regulate the Immigration of Aliens into the United States" (34 Stat. L. 898-1907 Supp. U. S. Com. Stats. 392). The latter Act made it a felony to import any woman or girl into the United States "for the purpose of prostitution or for any other immoral purpose". This Act was construed by the United States Supreme Court in *U. S. v. Bitty* (208 U. S. 572, 57 L. Ed. 553), and was held to apply to the defend-

ant in that case who had feloniously imported into the United States a certain alien woman for an immoral purpose, to wit, for the purpose of living with him as his concubine or mistress. The Court held, that, looking at the statute and the words in connection with the context, the true intent of the Act included such a case. In that case no question as to interstate commerce was involved, and the Court placed its decision squarely upon the proposition that Congress had power to prohibit the importation into the United States of any alien for an immoral purpose. The Court was dealing with a statute, the object of which was to exclude undesirable aliens from entering the United States, and construed accordingly so as to effect its object. The subject was "immigration", exclusively within the jurisdiction of Congress. Congress, of course, has power to prescribe the persons who shall be admitted into the United States under the immigration laws. Another section of the Act of February 20th, 1907, made it an offense to harbor or maintain any such alien in any house of prostitution for a period of three years after she shall have entered the United States. In *Jos. Keller v. U. S.* (213 U. S. 138, 53 L. Ed. 737), the Court held that the latter provision of the Act was void, and that Congress was without power to pass such law for the reason that the offense came within the accepted definition of police powers which is reserved to the states. Both these decisions appear right upon the plainest constitutional principles. In the first it

was merely held that Congress had power, under the express provision of the Constitution, to prohibit the importation of alien women into the United States for the purposes of prostitution or other immoral purpose. In the second, that Congress had no power to legislate as to offenses coming within the usual police powers of the State as to aliens after they had entered the United States. Neither of them has any particular bearing in the case at bar, nor does either of them discuss the question as to what is *interstate commerce*.

Before the statute under discussion was passed, there had been much agitation in the public press and in the various public bodies as to the suppression of the "White Slave Traffic". It was represented that one Alphonse Dufaur, a Frenchman, was at the head of a syndicate that had for the past ten years been importing into the United States two thousand women per year and that during one year, in Chicago alone, the syndicate had cleared one hundred two thousand dollars (\$102,000) by such importation of alien women. Accordingly, in July, 1902, at what is known as the "Paris Conference", at which all the principal European governments were represented, an agreement was entered into for the suppression of the "White Slave Trade". The United States was not a party to said conference, but in June, 1905, the President of the United States, in conformity with a resolution of the Senate, issued a proclamation declaring adherence on the part of the United States to the Paris Confer-

ence. It was, therefore, in this state of the public mind, and under these conditions, that the Act named "The White Slave Traffic Act" was introduced into the Senate of the United States, and considered in the "Committee of the Whole".

Reports of Committees as to the Purposes of the Act.

The purpose of the White Slave Traffic Act is indicated by the name expressly given to it by Congress—to suppress that traffic so far as conducted through the medium of interstate and foreign commerce. It was not intended for the suppression of immorality in general, that purpose being expressly disavowed by its framers.

Thus both the House and Senate Committees, in reporting the bill to their respective Houses, said (the Senate Committee adopting the language of the House Report). (H. Rep. No. 47, S. Rep. No. 886, 61st Cong., 2nd Sess.):

"A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution."

The Committee Reports above referred to also describe with great particularity the evil intended to be remedied by the Act, in part as follows:

“The evil, as a present-day existing evil of widespread dimensions which has arisen, has been given careful attention by the representatives of most of the civilized nations of the world, and has been made the subject of an international agreement. Thousands of public spirited citizens have combined in various National and State organizations for the purpose of lending their aid in its suppression. The white slave traffic has been so prevalent that prosecuting officers, both State and Federal, even under inadequate and insufficient laws, have been able to secure many notable convictions. It is an evil which many State legislatures have attempted to regulate within the past two or three years by means of the enactment of State statutes * * * the evil is one which cannot be met comprehensively and effectively otherwise than by the enactment of Federal laws.

“Investigations conducted by Government agents disclose the fact that a national and international traffic exists in the buying, selling, and exploitation of women and girls for immoral purposes. The traffic has come to be known the world over as ‘The White-Slave Trade’. It is referred to by the Paris conference as ‘The Trade in White Women’.

“There are few who really understand the true significance of the term ‘white-slave trade’. Most of those who have given only casual thought to the subject have the impression that women who lead immoral lives in public houses are there voluntarily, either because they are attracted by the excitement of such a life, or because they have found it an easy way of earning a living. In many cases such is not the fact.

The results of careful investigations into this subject disclose the fact that the inmates of many houses of ill-fame are made up largely of women and girls whose original entry into a life of immorality was brought about by men who are in the business of procuring women for that purpose—men whose sole means of livelihood is the money received from the sale and exploitation of women who, by means of force and restraint, compel their victims to practice prostitution. These investigations have disclosed the further fact that these women are practically slaves in the true sense of the word; that many of them are kept in houses of ill-fame against their wills; and that force, if necessary, is used to deprive them of their liberty.

“The characteristic which distinguishes ‘the white-slave trade’ from immorality in general is that the women who are the victims of the traffic are unwillingly forced to practice prostitution. The term ‘white-slave’ includes only those women and girls who are literally slaves—those women who are owned and held as property and chattels—whose lives are lives of involuntary servitude; those who practice prostitution as a result of the activities of the procurer, and who, for a considerable period at least, continue to lead their degraded lives because of the power exercised over them by their owners. In short, the white-slave trade may be said to be the business of securing white women and girls and of selling them outright, or of *exploiting them for immoral purposes*. Its victims are those women and girls who, if given a fair chance, would, in all human probability, have been good wives and mothers and useful citizens.

“The preamble of an existing international agreement on this subject states that the several governments ‘being desirous to assure to women

who have attained their majority and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the criminal traffic known under the name of trade in white women ("Traite des blanches") have resolved to conclude an arrangement with a view to devise proper measures to attain this purpose'."

And said reports contain this final statement as to the purpose of the Act:

"It is the purpose of the proposed laws, in so far as it may be possible for Congress to do so, to protect women and girls against *this criminal traffic* by providing for the punishment of *those engaged in that traffic* and by regulations established by the act."

The Bill Was Not Changed in Any Important Particular After Being Introduced.

It may be well to say, in reply to the assertion which has been occasionally made that the bill as reported to the House was afterwards materially changed, so that the statements made in the House Report as to the scope of the bill are not applicable, that that assertion is wholly without foundation. The bill as reported back to the House is set out in full on pages 804 and 805 of Vol. 45, Pt. 1, of the Congressional Record, together with the amendments reported by the Committee, and an examination of the bill as reported back to the House shows that it is identical in every substantial particular with the Act as finally passed, and at that time, and when introduced, it contained the words

“or for other immoral purposes” which have given rise to the doubt as to its scope. Neither in the House nor the Senate was the language of the bill changed in the respects referred to, and an examination of the debates on the bill show that it was discussed entirely from the standpoint of the suppression of the white-slave traffic (45 Cong. Rec., Pt. 1, 804-823, Pt. 2, 1030-1041). The bill passed the Senate as it came from the House, without amendment and without debate (45 Cong. Rec., Pt. 8, p. 9037).

The Reports of the Committees Show That They Regarded the Bill as Dealing Only With Commercialized Sexual Immorality.

Notwithstanding the fact that the bill as reported to the House contained the inhibition upon the transportation of women and girls “for the purpose of prostitution or debauchery *or for any other immoral purpose*”, the Committee on Interstate and Foreign Commerce which reported it, through Mr. Mann, generalized that language as referring to “prostitution”, meaning thereby commercialized sexual immorality. Thus the Committee said (H. Rep. No. 47, *supra*):

“Police Powers of States Not Interfered With.

“It is not the purpose of the bill to interfere with or usurp in any way the police powers of the States. The bill reported does not endeavor to regulate, prohibit, or punish *prostitution* or the keeping of *places* where *prostitution* is indulged in. The prohibition of *prostitution and other immoral practices* and the pun-

ishment of the *practice of prostitution or the keeping of houses of ill-fame, or other immoral places*, in the several States are matters wholly within the powers of the States and the Federal Government has no jurisdiction over those subjects. On the other hand, it has been shown in the investigation relating to the '*white-slave traffic*' that persons engaged in *that business* in some of the large cities feel quite free to engage in the *traffic* as between the States, when they hesitated about engaging in the *traffic* wholly confined to one State.

“Provisions of the Bill.

“Most of the provisions of the bill are based upon the power of Congress over Interstate and Foreign commerce. In the second section of the bill it is made a crime for any one to knowingly transport in interstate or foreign commerce any woman or girl for the *purpose of prostitution*, or for the purpose of inducing, enticing, or compelling a woman to become a prostitute; and in the same section it is also a crime for any one to knowingly procure a ticket to be used by a woman in interstate or foreign commerce going to a place for the *purpose of prostitution*, whereby such woman shall be actually transported in interstate or foreign commerce, or in any Territory, or the District of Columbia.

“Section 3 of the bill makes it a crime for any person to knowingly persuade, induce, entice, or coerce any woman or girl to go from one State to another for the *purpose of prostitution*, and who shall thereby knowingly cause such woman to go or be transported as a passenger upon the line of any common carrier in interstate or foreign commerce.

“Section 4 applies only to a girl under the age of eighteen years, and is practically the same as section 3, except that it makes a higher

penalty apply to the crime of misleading a girl under 18 *to become a prostitute* and transporting her in interstate commerce *for that purpose*. The provisions of section 2 of the bill make the crime, first, to knowingly transport, and, second, to knowingly furnish a passenger ticket for transportation for the *purpose of prostitution*, when accompanied by the use of such ticket in interstate or foreign commerce. Section 3 makes the crime to knowingly persuade, induce, entice, or coerce a woman into *prostitution* and thereby cause her to go and to be carried or transported as a passenger in interstate or foreign commerce."

The statement by the House of the "Provisions of the Bill" just quoted was also adopted by the Senate Committee on Immigration in reporting the bill after it came from the House (45 Cong. Rec., Pt. 8, pp. 9037, 9038).

It is clear from the Committee reports referred to, as well as from the debates in the House, that it was understood by all that the bill only dealt with the white-slave traffic and those engaged therein, and that it only undertook to inhibit the transportation of women or girls in interstate or foreign commerce with the intention that they should engage or continue in lives of ill-fame, that is, become prostitutes, the words "debauchery or for any other immoral purpose", or as they otherwise appear in the Act, "to give herself up to debauchery, or to engage in any other immoral practice" being used to cover all phases of a life of shame—of commercialized sexual immorality.

To hold that the Act extends beyond this and applies to ordinary instances of fornication and adultery, would be to pervert its meaning and extend the Act to matters of general morality which was not only not the intention of Congress to reach, but which the legislative committees in charge of the bill expressly disavowed any intention of reaching. As to the suppression of the white-slave traffic all the members of Congress were practically of one mind. The only question was as to the power of Congress to accomplish that object through a regulation of interstate commerce. But there is no suggestion whatever in the legislative history of the Act of any intention to regulate immorality in general. As to the advisability of the Federal Government undertaking to enter that field, opinions would probably have differed. But any discussion of that matter was precluded by the express disavowal of the legislative committees in charge of the bill of any such purpose.

It is to be noted that the Act constituted a new departure so far as the subject of interstate commerce was concerned. Theretofore the Federal Government had not undertaken to regulate matters of this kind, although conducted through the medium of interstate commerce, and there was undoubtedly a general reluctance in Congress to make regulations upon the general subject of sexual immorality, theretofore left to be dealt with by the State. Hence the disavowal of any such purpose in the Committee Reports above quoted. It was only

because the white-slave traffic had, as Congress believed, assumed such alarming proportions, that this legislation was enacted to remedy that particular evil.

Properly Construed the Language of the Act Is Limited to the White Slave Traffic—Commercialized Sexual Immorality.

Examining the language of the statute itself, and considering the same in the light of the history and purpose of the Act as above set forth, any doubt as to its meaning is easily resolved.

The most general provision of the Act is the first provision of section 2, which penalizes the transportation in interstate and foreign commerce of women and girls "for the purpose of prostitution or debauchery, or for any other immoral purpose". Yet it is manifest at once that the words "prostitution" and "debauchery" both imply a life of immorality, and not simply a sporadic act or acts of sexual intercourse, and the words "or for any other immoral purpose" must be construed to mean similar practices, under the rule of *ejusdem generis*, especially where as here the declared purpose of the Act and the evil to be remedied requires that construction.

But the purpose of the Act becomes clearer as we proceed. Section 2 continues—"or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give

herself up to debauchery, or to engage in any other immoral practice."

It is clear from this language that Congress was denouncing the acts of those who, through the medium of interstate and foreign transportation should induce, entice or compel women or girls to give themselves up to *lives* of prostitution, debauchery and other sexual immorality; to engage in such practices as a *pursuit, calling or business*.

In section 3 of the Act, similar expressions are used, the language with reference to the intent and purpose on the part of the person bringing about the transportation being that "such woman or girl *shall engage* in the *practice* of prostitution or debauchery, or any other immoral *practice*."

So, in section 4 of the Act, referring to the inducement or coercion of girls under 18 years of age, the purpose and intent denounced is that "she shall be induced or coerced *to engage in* prostitution or debauchery, or any other immoral *practice*".

Furthermore, it is to be observed that criminality arises from the purpose and intent with which a woman or girl is transported. Ordinarily, no one but a "panderer" or "procurer" would cause or induce a woman or girl to go from one State to another, etc., for the purpose of *engaging* in prostitution or debauchery, or other immoral practices. It will be remembered in this connection, that the Committee Reports stated the statute was aimed *solely* at panderers and procurers.

So also section 6 of the Act, which contains provisions for carrying out the international agreement for the suppression of the white-slave traffic, has reference entirely to alien women or girls leading lives of ill-fame in this country—to commercialized vice. That section makes it the duty of the Commissioner General of Immigration:

“to receive and centralize information concerning the procurement of alien women and girls with a view to their debauchery, and to exercise supervision over such alien women and girls, receive their declarations, establish their identity, and ascertain from them who induced them to leave their native countries, respectively; and it shall be the duty of said Commissioner-General of Immigration to receive and keep on file in his office the statements and declarations which may be made by such alien women and girls, and those which are hereinafter required pertaining to *such alien women and girls engaged in prostitution or debauchery* in this country, and to furnish receipts for such statements and declarations provided for in this act to the persons, respectively, making and filing them”.

Said section 6 then provides:

“Every person who shall keep, maintain, control, support, or harbor in any house or place *for the purpose of prostitution or for any other immoral purpose*, any alien woman or girl within three years after she shall have entered the United States from any country, party to the said arrangement for the suppression of the white-slave traffic, shall file with the Commissioner-General of Immigration a statement in writing setting forth the name of such alien woman or girl, the place at which she is kept,

and all facts as to the date of her entry into the United States * * *”.

Note the use of the words “for other immoral purposes” in this section in connection with houses of ill-fame.

Finally, section 8 of the Act presents the most unusual spectacle of Congress giving a specific name to this legislation, by saying that it shall be known as “The White-Slave Traffic Act”.

Looking at the whole Act, therefore, in the light of its history, its declared purposes and limitations, and its given name, it is manifest that Congress was aiming therein simply to protect the actual or prospective victims of the white-slave traffic, and that the Act has no application to the ordinary instances of sexual immorality where no element of the white-slave traffic is involved.

Scope of the Act as Indicated by the Debates in Congress.

As stated above, the bill was reported to both Houses as dealing only with the subject of the white-slave traffic, and as not applying to the subject of immorality in general.

The debate in the House on the bill (it was not debated at all in the Senate) was confined to the constitutional phases of the matter, it being claimed that the regulation of prostitution was a matter entirely for the States. On the other hand the proponents of the bill contended that where white-slave traffic was conducted through the medium of interstate commerce, i. e., involved transportation

between the States, it became a subject of Congressional regulation to the extent of prohibition because of its invidious nature.

Even the opponents of the bill did not claim that it applied to other than those engaged in the white-slave traffic, but the bill was debated by all as dealing only with the subject of commercialized vice—"prostitution", as reported by the Committee in charge thereof.

The following extracts show the general understanding in the House as to the scope of the bill.

45 Cong. Rec., Pt. 1, p. 812:

Mr. Richardson: This bill does not punish the alien woman, or any other woman, for being transported from one State to another, does it?

Mr. Sims: Do you desire that it should?

Mr. Richardson: I am asking you if it does. Yet you punish the man who aids the woman. You punish him for aiding a crime that you do not punish her for committing.

Mr. Sims: It is written in a book, with which the gentleman from Alabama is very familiar, that 'the love of money is the root of all evil'. Now, what is the man procuring this woman for? What does he take her from one State to another for? For what purpose does he bring her from a foreign country? To make money. To make merchandise of a human soul. Which is the more evil, the deluded, deceived, imprisoned soul that is being carried from one State to another by that scoundrel or that scoundrel himself? The poor deluded female perhaps would not be able to make the trip were it not for the demon, in human form, who is furnishing money to carry her there, to sell her soul and body into hell, in order that

he may have a few more dollars to put in his unholy pocket.

Mr. Richardson: The State would punish them both.

Mr. Sims: As I was starting to say, was there ever any remedial legislation proposed against any evil that those whom it was intended to reach were not the first to say, 'You cannot execute this law, you cannot carry it out, it is impractical. If they do not object to the law why are they so anxious that it shall be effective when passed? Whom are we higgling in favor of? A class of importers, procurers, who are bringing innocent women and girls from foreign countries, and from one State to another, to engage in that which damns both soul and body, all for the sake of money; and the meanness which illustrates the character of the men who engage in this traffic is that they do not even divide with the poor woman what they get from the sale of them. They bring a woman here and immure her in a den. They take every rag of her street clothes away from her, and dress her in a way that she does not dare go out on the street. If she did she would be arrested. Then, when this Congress offers to pass legislation to prevent a horror which the devil would be ashamed of, why should we higggle over a doubtful question of possible constitutional construction by the courts in the future?

This shows that, as above pointed out, all the provisions of the bill—those relating to interstate transportation as well as those contained in section 6 relating to "the procurement of alien women and girls with a view to their debauchery", has reference to the same class of persons—procurers and

panderers—the active agents of commercialized sexual immorality.

Representative Adamson, who opposed the bill on the ground that it was unconstitutional, said (45 Cong. Rec., Pt. 2, pp. 1032, 1033) :

“It will be observed that no attempt is made in either bill to prevent or punish prostitution. It will be observed that immorality in transit, on the cars or other vehicles, is not prohibited at all. If the bill is constitutional, that provision would have been constitutional. It may be observed that only buying a ticket for a woman who is going to another State for prostitution is prohibited. There is no attempt to prohibit a vile man from buying a ticket to be used by himself or another vile man for transportation into another State for the purposes of immorality. If there is any sense in that part of the bill, these provisions ought to be included, but the chief points to be noticed are these: First, these provisions are liable to furnish boundless opportunity to hold up and blackmail and make unnecessary trouble, without any corresponding benefits to society. Second, you cannot convict a man for buying a ticket unless you prove the purpose. The only way you can prove the purpose is by following the woman and by proving the prostitution. If you can prove the prostitution, you can accomplish your purpose under the State laws. Oh, they say, but a State cannot pass and enforce a law to prohibit a man from buying a ticket to send a woman into another State for an immoral purpose. In the first place, it is unnecessary to pass such a law. * * * Now, the present proposition is that a general ticket unlimited to the use of any person shall be tabooed and the man shall be imprisoned for buying it if it is to be used by a woman to go into another State for the purpose of prostitution.”

Ib., p. 1035:

“Mr. Peters: Mr. Speaker, the considerations which prompt the support of this bill are so widespread and its objects are so well understood and meet with such universal approval that no explanation or repetition of them need be made of them to this House.

The bill aims to aid in the suppression of the white-slave traffic by making it a felony to purchase interstate transportation for any woman going to a place for purposes of prostitution. The act, in section 6, also compels all keepers of disorderly houses who have in them alien women of less than three years' residence in this country to file a report of such women with the Commissioner-General of Immigration.

The traffic which this bill seeks to suppress has reached such proportions that an international conference has been held for its consideration, and its conditions and extent in this country have been called to public attention by the report of the Commissioner-General of Immigration, both for the years 1907 and 1908, and by the recommendations of the Immigration Commission of December 10, 1909.”

Ib., p. 1037:

Mr. Saunders: Mr. Speaker, this bill has a most meritorious purpose, and rests upon the well-established power of Congress to regulate interstate and foreign commerce.

This power is now called into exercise, in an effort to break up a villainous interstate and international traffic in innocent girls and women who are in many cases induced to leave home under specious promises of steady employment at remunerative wages, only to find themselves in the result, deprived of their liberties and compelled to lead vicious and im-

moral lives, under conditions of restraint and compulsion, which have been aptly and universally styled, 'white slavery.' ”

In this case it does not appear, when taking the Act by its four corners, the reports made to the two houses of Congress, the debates in Congress in regard to the bill, that it ever entered the mind of the legislature to make an Act like that of which the defendant is charged, a criminal offense. We apprehend that it never entered the minds of the framers of the Constitution that interstate commerce would ever be attempted to be construed so as to include the mere paying of the railroad fare of one lover by another; such being a matter which exclusively concerns the State in which the individuals reside. If such laws should be passed, and if in this great age of reform such matters should be prohibited, it surely should be by the State legislature, and that the time of the United States courts and of the United States District Attorneys should not be taken up in attempting to ferret out and punish any particular or occasional violation of the moral law by individuals.

**SECOND: THE LEGAL INTERPRETATION OF THE ACT AS TO
THE ALLEGED CRIME OF WHICH THE DEFENDANT STANDS
CONVICTED.**

It seems plain that interstate commerce means the transporting of property in commerce or an exchange of commodities, or, as Judge Field said

in *County of Mobile v. Kimball* (102 U. S. 691, 26 L. Ed. 238):

“Commerce with various countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation or transit of persons and property, as well as the purchase, sale and exchange of commodities.”

The Supreme Court of the United States said in the license cases, 5th How. 504:

“That which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States.”

In the trade mark cases, 100 U. S. 96, the Court said:

“When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law or from its essential nature that it is a regulation of commerce with foreign nations or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress.”

The evil intended to be remedied by the Act was the business of transporting women for gain for purposes of prostitution or debauchery. That is, for the purpose of engaging in the business of debauchery, or engaging in the business of prostitution. The defendant had the right to pay the railroad fare Lola Norris to Nevada, she traveling as his friend. He had the right to pay her railroad

fare, except by doing so he was helping or aiding her in some *unlawful enterprise or business* prohibited by and named in the statute. The right to pay a woman's car fare on a railroad train does not depend upon her education or moral principles, her honesty or her integrity. The purpose for which such fare was paid must have been to enable the woman to engage in the *business* of prostitution or the *business* of debauchery in a commercial sense. Suppose that defendant had paid the fare of Lola Norris to go from Sacramento to Reno for the purpose of aiding in a prize fight or other crime, could it be claimed that he was engaged in interstate commerce? And yet such would be deemed an immoral purpose. Who shall say that any single act or thing is of itself immoral? There is no exact definition of the word, and evidently the different members of the Court have different ideas as to its meaning. Suppose instead of using the words "or for any other immoral purpose" the statute had read "or for any other wrong purpose", would it be contended that this Court can hold the defendant criminally liable because, forsooth, according to its view an act might be wrong? A defendant surely cannot be held liable for engaging in interstate commerce by reason of transporting a person, unless such transportation is for some unlawful commercial purpose.

One charged with a crime has the right to be told in the plain language of the indictment what acts the Government claims he did. We can understand

the charge a defendant is required to meet when he is told that he transported a woman from one state to another for the purpose of having her engage in prostitution or in debauchery as the word is understood; but when we are told that he transported a woman "for an immoral purpose" we cannot understand what he has to meet by such charge. Can it be supposed that the framers of our Constitution, when they gave Congress power to regulate interstate commerce, had any idea that taking a lover from one State to another was commerce in the sense in which it was used? To say that such act is interstate commerce seems, with all deference, if not absurd, at least difficult of comprehension. What commodities are being exchanged? Who is buying or selling, and what is being bought or sold? If defendant might be considered as paying the freight charges on the girl, to whom was the freight consigned, and who is to pay the defendant for it? Was he engaged in commerce when he sold nothing and intended to sell nothing—when he exchanged no commodity and intended to exchange none?

If this Act is applicable to this case, then the person who pays for a railroad ticket from Sacramento to Reno for a virtuous female whose intention is to enter into an agreement by which she is to become his concubine, was engaged in interstate commerce while purchasing the ticket.

**The Act Has Been Interpreted in Accordance With the Views
Herein Expressed by the Executive Officers of the United
States, and by the Judiciary.**

On July 17, 1912, Charles C. Houpt, U. S. District Attorney for Minneapolis, wrote a letter to Attorney-General Wickersham in St. Paul, in which he said as follows:

“Department of Justice
Office of United States Attorney,
District of Minnesota.

St. Paul, July 7, 1912.

“The Attorney General,
Washington, D. C.

“Sir:

“I have the honor to submit for your direction and advice the facts in a case which is claimed to come within the purview of the Act of June 25, 1910, called the ‘White Slave Traffic Act’.

“One Ada Cox, twenty-four years of age, residing at Chicago, Ill., came to St. Paul in October, 1910, at the solicitation and expense of one Rufas Edwards. On her arrival here, Edwards met her at the station. They passed the day riding, lunching and drinking, and the night following at a house of assignation in the city of Minneapolis. She remained there three days with Edwards and then returned to Chicago. In June, 1911, she repeated the visit under like circumstances.

“June 12, 1912, Miss Cox applied to me for a warrant of arrest of Edwards under the above named act. At that time she made a statement of her connection with Edwards which was taken in shorthand by Mr. J. M. Dickey, Assistant United States Attorney, in his office, and by him written out.

“A copy of this statement is enclosed.

“Careful consideration of the facts and cir-

cumstances as related by Miss Cox fail to convince me that her case came within the spirit and intent of the Mann Act. *The element of traffic is entirely absent from this transaction.* It is not a case of prostitution or debauchery and the general words 'or other immoral practice', should be qualified by the particular preceding words and be read in the light of the rule of *Ejusdem Generis*. This view of the statute is the more reasonable when considered in connection with Section 8 where Congress employs the terms 'slave' and 'Traffic' as indicative of its purpose to suppress certain forms of abominable practices connected with the degradation of women for gain.

"Since I have hesitated about having a warrant issued for the arrest of Edwards, Miss Cox has *elisted certain club women in her behalf who are insisting on the arrest being made.*

"As this case is typical of many others that are liable to be brought to this office I deemed it proper to submit the facts to ascertain if my interpretation of the statute is in harmony with the departmental construction.

Very respectfully yours,
 (Signed) CHAS. C. HOUP, United States Attorney."

Attorney-General Wickersham replied to this letter:

"Department of Justice.
 Washington, D. C.

"July 23, 1912.

"United States Attorney,
 St. Paul, Minn.

"I have received your letter of the 17th instant concerning a statement of the facts with reference to the complaint of one Ada Cox, against one Rufas Edwards of an alleged violation of the White Slave Traffic Act.

"I agree with your conclusion that the facts and circumstances set forth in your letter and its enclosures do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the Federal Courts unless other and different facts are presented to you.

"Respectfully,

(Signed)

GEO. W. WICKERSHAM,
Attorney General."

And the same opinion was given by the Assistant Attorney-General, Harr, in the case of *Hoke v. United States*, 227 U. S., 57 L. Ed. 524. He uses this language:

"Section 8 of the Act provides that it shall be known and referred to as the 'White-Slave Traffic Act'. This title, the provisions of sections 2, 3, and 4 of the Act with reference not only to the transportation in interstate and foreign commerce of women and girls for the purpose of prostitution or debauchery, or any other immoral purpose, but to persuading, inducing, enticing, and coercing any woman or girl to go and be transported from one place to another in interstate or foreign commerce for any such purpose, and the fact that the Federal supervision of alien women and girls and of persons keeping or harboring them in homes of prostitution or for any other immoral purpose provided for by section 6 of the Act, is said to be established in pursuance of and for the purpose of carrying out the international agreement for the suppression of the white-slave traffic signed at Paris on May 18, 1904, and which was adhered to by the United States on June 6, 1908, *all indicate that the underlying purpose of the act is the suppression of such traffic in women and girls so far as it comes within the*

jurisdiction of Congress over interstate and foreign commerce.

“This purpose was also plainly stated by the committees of Congress in recommending the passage of the bill. * * *”

Again (p. 15):

“The act is carefully confined to the evil intended to be remedied—the exploitation of women and girls for private gain—the white-slave traffic. It reaches procurers and panderers and those engaged in conducting immoral houses, shows, etc., who, treating women and girls as subjects of barter and gain, transport or cause them to be transported, or facilitate their transportation, from one state to another, or to a foreign country, for immoral purposes.

“The act does not penalize either the voluntary going or coming of women for the purpose of prostitution, nor the act of one who, for charitable or philanthropic reasons, extends aid to an unfortunate female by purchasing transportation for her. Nor would a common carrier or its agents be guilty of violating the act simply by transporting a woman or girl who may intend to engage in prostitution. Only he who does any of the acts mentioned in the statute with the intent and purpose that the woman or girl involved shall engage in a life of prostitution or other immoral practice, is within the letter and spirit of the law. This appears not only from the language used with reference to purpose and intent, but from the insertion of the word ‘knowingly’ in the several provisions of the act.”

Directly after the case at bar was decided, U. S. District Judge John Pollack of Kansas, in the case of *People v. Lee Baker*, in September, 1913, held

that the Act did not apply to a case like this. He said:

“Under this law, as I construe it, the commercial feature must be proved. It was not the aim of Congress to prevent a personal escapade of any man. If the government cannot prove that this man took the girl to another state for a commercial purpose, I shall instruct the jury to acquit him.”

This ruling of Judge Pollack's has been quoted in law journals and in various leading periodicals of the United States with approval, and as being the true interpretation of the Mann Act (see Judge Pollack's opinion of the law in full, Opening Brief, pp. 76-83).

In *Hoke v. United States*, 227 U. S. 308, 322, the Supreme Court said:

“Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of the lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from *the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.*”

The view of the Act above expressed is also in line with the construction which has been given similar Acts by State Courts. Thus, in *People ex rel. Howey v. Warden, etc.*, 207 N. Y. 354 (101 N. Y. Rep. 167), the Court of Appeals of the State of New York held that a charge of violating a statute of that State, providing that one is guilty of abduction who “entices an unmarried female * * * into a house of ill-fame or of assignation, or elsewhere, for the purposes of prostitution or sexual intercourse” was not supported by evidence of enticing a woman to an unfrequented roadside for the purpose of having a single act of illicit intercourse with her, but that the test of guilt was “whether she is enticed into some place for purposes of prostitution, as generally understood, rather than for a single act of intercourse”. See also *Miller v. State*, 121 Ind. 294.

The construction herein given the Act by the reports of the Committees upon the bill, by the debates in Congress, by the executive officers of the United States, and by judicial expression is in accordance with the principle that the Government and the Courts will never hold a subject guilty of a crime unless such crime is defined in clear and unmistakable language.

In *Todd v. the United States*, 154 U. S. 39, L. Ed. 982, it is said:

“It is axiomatic that statutes creating and defining crimes cannot be extended by intentment, and that no act, however wrongful, can

be punished under a statute unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute'."

In *United States v. Eaton*, 144 U. S. 36; L. Ed. 591 the Court, in considering whether or not the defendant had violated certain provisions of the Act of Congress in regard to the sale of oleomargarine, said:

"It is necessary that a sufficient statutory authority should exist for declaring any Act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited."

In *Ex Parte McNulty*, 77 Cal. 164, it was held that it was not within the power of the legislature to punish the defendant for what was termed "unprofessional conduct" by a board of medical examiners. Justice McFarland, who wrote the opinion in his usual forcible style, said:

"It would be vain to inquire what intent lurked in the minds of the persons who happened to be members of the legislature when the act was passed. It certainly would be a forced thing to imagine their intent to be that a man should lose his liberty for the violation of any vague, undefined notion of unprofessional conduct, which might, after the fact, be entertained by certain individuals constituting

a board of examiners. At all events, the question whether or not the conduct in question is made a crime must be determined from the language used in the statute, and we find there nothing that declares such conduct to be a criminal offense. * * * Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law.

THIRD: HAS THE ACT BEEN HELD TO APPLY TO A CASE LIKE THIS BY THE SUPREME COURT OF THE UNITED STATES?

We have carefully gone through the cases, and we claim that the Supreme Court of the United States has not sustained the doctrine of this case, and that this decision as an interpretation of the Act, stands alone, with one exception which I will further call attention to before completing my argument.

The first case we find is *United States v. Westman* (182 Fed. Rep. 1017). In that case the Court expressly stated that the indictment was challenged upon two grounds; first, that the Act is an unwarrantable attempt on the part of Congress to exercise police powers which belong to the States, and, second, that transporting persons from one State to another is not a subject of commerce.

Judge Wolverton, the District Judge who wrote the opinion, merely held that the indictment was sufficient as against these two objections. It is not stated in the opinion what the immoral purpose was for

which the women were transported. But as there were two of them, Myrtle Westman and Connie Bledsoe, it is evident that the case is not like the one at bar. The defendant was evidently charged with transporting them for the purpose of prostitution. There were nine counts in the indictment, but as I have not the record before me I am unable to state the contents of the indictment, and it does not appear from the report.

The next case is *Hoke v. United States* (227 U. S. 57; L. Ed. 523). The indictment in that case was against a woman, Effie Hoke, and her accomplice, one Economides, who is alleged to have aided her in inducing one Annette Baden and another woman, whose name is not given, to go from New Orleans, in the State of Louisiana, to Beaumont, in the State of Texas, "for the purpose of engaging in the practice of prostitution"—one woman procuring another woman to travel to another State for the purpose of prostitution. It is easily seen that the point in this case did not arise. Therefore, if anything was said in the opinion of Justice McKenna on the question outside of the point at issue, it was mere dicta. It was in this case that Assistant Attorney General Harr used the language in his brief heretofore quoted. There was but one point discussed in the case—that is, the power of Congress under the commerce clause of the Constitution. The Court in the opinion said:

"Commerce among the states, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property."

With this language we have no fault to find. It is said in the opinion that the Act condemns transportation "for the immoral purposes mentioned". This defendant was not convicted or found guilty of transportation for one of the immoral purposes mentioned in the statute. It is not my contention that if the indictment had charged the defendant with one of the immoral purposes mentioned in the statute, it would be void. The opinion further states:

"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised whether independently or concurrently to promote the general welfare, material and moral. This is the effect of the decisions; and surely, if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the *systematic* enticement to and the *enslavement in prostitution and debauchery* of women, and, more insistently, of girls."

It will be noticed that the Court again repeats the words "prostitution and debauchery", which are the immoral purposes mentioned in the statute. The defendant in that case, Effie Hoke, was the keeper of a house of prostitution at Beaumont, and the women transported were prostitutes. There is not a word in the case lending any countenance to

the construction given the statute in the case at bar. Defendant in the case at bar was not taking prostitutes to a house of prostitution.

The next case is *Athanasaw v. United States* (227 U. S. 57, L. Ed. 528). This case but followed the Hoke case, the opinion being written by the same Judge. The charge in the latter case was that defendant transported "a girl by the name of Agnes Couch from Atlanta, Georgia, to Tampa, Florida", for the purpose of debauchery and "to give herself up to debauchery". The Court held that debauchery, as named in the statute, had a well-known meaning; that it means "an excessive indulgence of the body; licentiousness, drunkenness, corruption of innocence; taking up of vicious habits". And the Court said:

"The term debauchery as used in this statute has an idea of sexual immorality, as quoted in this section";

and further:

"It is true that the Court did not give to the word debauchery or to the purpose of the statute, the limited definition and extent contended for by defendants, nor did the Court make the guilt of the defendants to depend upon having the *intent themselves to debauch the girl*, or to intend that someone else should do so. In the view of the Court, the statute had a more comprehensive prohibition, and was designed to reach acts which might ultimately lead to that phase of debauchery which consisted in sexual actions. The general expressions of the Court, however, were qualified to meet and not go beyond the conduct of the

defendants. The Court put it to the jury to consider whether the employment to which the defendants called the girl and the influences with which they surrounded her tended to induce her to give herself up to a *condition of debauchery*, which eventually and naturally would lead to a course of immorality sexually."

When the record in the latter case is examined it will be seen that an innocent girl, through an advertisement, was lured to sign a contract, and leave her native town in Georgia and go to Tampa, Florida, and enter a bawdy theatre or dance house, which was shown to be a place of debauchery. The Court concludes its opinion by saying:

"The plan might have succeeded if the coarse precipitancy of one of the defendants and the ribaldry of the habitues of the place had not shocked the modesty of the girl. And granting the testimony to be true, of which the jury was the judge, the employment to which she was enticed was an efficient school of debauchery of the special immorality which the defendants contend the statute was designed to cover."

The next case is *Bennett v. U. S.* (227 U. S. 57, L. Ed. 531), which follows the two cases just cited, the opinion being written by the same judge. In the latter case, the defendant was indicted for transporting two girls, Opal Clark and Ella Parks. The opinion does not state the purpose as charged in the indictment, as the question seems not to have been before the Court, and merely says that the demurrer raised the question as to the consti-

tutionality of the statute, and concludes by saying that in the former cases it had held the statute constitutional.

The next case is *Harris et al. v. U. S.* (227 U. S. 57, L. Ed. 534). In that case, the defendants (two women) were indicted "for transporting and causing to be transported, in interstate commerce, certain named women for the purposes of prostitution." The opinion by the same judge merely held that the Court had already discussed the statute, and that there was no variance between the allegations and proof, and that the evidence was sufficient to sustain the verdict.

The next case is *Suslak v. U. S.*, 213 Fed. Rep. 915. That case was decided in the Circuit Court of Appeals of the Ninth Circuit, in which two of the judges now sitting in this case concurred. The indictment contained twelve counts, all tending to show that the defendant transported, or aided in the transportation of, Grace Beal from Spokane, Washington, to Butte, Montana, for the purpose of prostitution. She not only appears to have been transported for such purposes, but she afterwards plied her vocation in Butte, Montana, carrying out the purposes for which she was transported. On examining the case it will be seen that there is no question as to the defendant's intention to profit or make money by transporting the woman to Butte, or, as one of the witnesses said, "so that he could make a fortune out of her".

The case, therefore, does not decide the question at bar, and there is nothing in the language there used in conflict with our contention in this case. The Court there said:

“Moreover, the denunciation of the law is not against transportation for the purpose of debauchment, but for the purposes of debauchery. In the Century Dictionary debauchery is defined as: ‘Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust.’ So Webster, while giving, as one of the meanings, seduction from virtue, duty or allegiance, also defines the term as: ‘Excessive indulgence of the appetites, especially excessive indulgence of lust; intemperance; sensuality; habitual lewdness.’ It was in this sense of *unlawful indulgence of lust* in which the term was intended to be used in the act.”

If, as stated in the case last cited, the law is not against *transportation for debauchery*, it cannot apply to this case.

The principal case relied upon by the Government is *Johnson v. United States*, Fed. Rep. Vol. 215, No. 4, Oct., 1914. That case is not binding upon this Court and will commend itself only in so far as its reasoning convinces. This Court well knows that a decision is often merely the opinion of the judge who writes it, appearing on its face sufficiently plausible that it is often concurred in by the other members of the Court without a full and careful study of the case. The case is apparently in conflict with the views I have endeavored to express in this argument and with

the views expressed in *Suslak v. United States*, and is not easily understood. It certainly is not, in my opinion, well reasoned in respect to the apparent ruling therein contained. The Court in discussing the words "Other immoral purpose" says that they

"are words of such generality that a criminal conviction thereunder could not be tolerated whose purpose was any and every sort of immorality."

With this statement I agree, and it is in line with the authorities and reasoning applied to criminal statutes.

The Court, however, further says that the words must be limited "to that genus of which the preceding descriptions are species"; and further, that

"Prostitution, the first species, involves the financial element."

Then the Court, in speaking of the second species—debauchery—says that

"No financial element is necessarily involved in sexual debauchery,"

and concludes that Johnson, if he paid the transportation of the girl from Pittsburgh to Chicago for the immoral purpose of having sexual intercourse with her, was guilty of the charge of violating the statute known as the "White Slave Traffic Act".

The Court said that the evidence failed to sustain the charge as to transportation for the purposes of prostitution. It was not pretended that the girl

was transported for the purpose of debauchery, for the evidence shows, and the Court states, that she was a prostitute and Johnson first met her in a brothel. Therefore, Johnson did not transport her for the purpose of prostitution nor for the purpose of debauchery, because he could not debauch a prostitute, but, for a purpose not named in the statute. The Court seems to hold that "sexual intercourse is of the genus of which prostitution and debauchery are species". It seems to me, with all due deference to the Court, difficult to understand from reading the Act how it can be understood therefrom that "sexual intercourse" was the "genus" the various species of which, although not named, are included in the words "other immoral purpose". The words "sexual intercourse" are not mentioned in the Act. The genus was a mere judicial conclusion, for while "prostitution" and "debauchery" are named, no genus is named in this Act other than the "White Slave Traffic Act".

Prostitution is defined by law writers as the "common lewdness of a woman for gain"; and debauchery as "Excessive indulgence in sensual pleasures of any kind, gluttony, intemperance, sexual immorality, unlawful indulgence of lust".

There is no statement to the effect that Johnson transported the girl for the purpose of engaging in or carrying on the business of debauchery. The Court cites Hoke's case (*supra*) but it has before been shown (in my humble opinion) that it con-

tains no such diction. It further cites Athanasaw's case (*supra*) and says it

“Teaches that the providing of interstate transportation for the mere purpose of attempting to lead a chaste girl into unchastity is a felony without proof that the defendant intended to be the debaucher or that he intended to profit by the girl's hire if she should become a prostitute.”

I may be dull of apprehension but that case does not so teach me. I earnestly ask this Court to examine the case and see if in this Court's opinion it contains any such doctrine. The charge in that case was “for the purpose of debauchery” or “to give herself up to debauchery”. The girl answered an advertisement for chorus girls and was transported from Suwanee, Georgia, to Tampa, Florida, to appear at the Imperial Theatre at \$20 per week. The theatre was operated by defendants and the girl was hired and transported by their agent. The girl testified that one of the defendants asked her

“To talk to the boys and make a hit, and get all the *money I could out of them*. His room was next to mine and he told me that he was coming in my room that night and sleep with me.”

She further testified that she was told she would “like it when she got broke in”.

The trial Court in that case, in instructing the jury, said:

“The intent and purpose of the defendants at the time of furnishing this transportation for Agnes Couch is the very gist of the ques-

tion in this case. Did they intend to induce or entice or influence her to give *herself up to debauchery*? It makes no difference whether the *profits which would be made by the defendants* came from the sale of liquor or other immoral purpose."

The Supreme Court approved of the instructions given by the trial Court and said that the Court by its instructions did not

"make the guilt of the defendants to depend upon having the intent themselves to debauch the girl."

The fact that the defendants in the Athanasaw case were to profit by the girl's earnings is apparent from the entire case. In fact it was not questioned in the Supreme Court. How then can it be that the case teaches that the statute is violated without proof that defendant "expected to profit by the girl's hire"?

The cases cited by the Circuit Court of Appeals in the Johnson case do not support the broad statements therein contained. The reasoning is not (to my mind) convincing. How did the Court arrive at the conclusion that the "genus" to which the words "other immoral purpose" are to be applied is "sexual intercourse"? How did it arrive at the conclusion that paying a woman's fare from one State to another by a man whose mistress she is for no purpose of profit or gain, but at a financial loss to the party paying the fare, is "interstate commerce"? Did such interpretation of the Constitution ever enter the mind of the great men who

took part in framing it? Did the framers of the Constitution intend that Congress should have power to punish every man who might travel from one State to another with his mistress? Was that the "regulation of commerce between the States" that was in mind at the time? It does not seem that such is the right and logical construction of the Act. It seems plain if such construction should prevail that the Act should be entitled "An Act to prevent unlawful sexual intercourse between the inhabitants of the States when they travel from one State to another".

In the case at bar there is no evidence in the record that sexual intercourse was unlawful either in California or in Nevada.

There Is No Evidence in This Record Sufficient to Raise Even a Presumption That the Defendant Transported Lola Norris for the Purpose of Sexual Intercourse.

The girl was the only witness as to the intent and she testified that the object was to escape from the notoriety and threatened arrest and prosecution at Sacramento. She further testified that mistress or concubine or sexual intercourse was never mentioned by either defendant or herself. According to her testimony she was a virgin and had never had sexual intercourse with defendant or any other man. The law in its mercy never presumes guilt, but on the contrary, delights in freeing those brought before it if the evidence does not clearly

show that every material element constituting a crime has been proven. In the Johnson case (supra) the Court expressly stated that the fact that Johnson telegraphed seventy-five dollars (\$75) to the girl at Pittsburgh telling her to go to Chicago at Gresham's and wait for him, that she went there and shortly thereafter had sexual intercourse with Johnson, tended to raise a suspicion

“that the purpose of the transportation was sexual intercourse. This evidence also is consistent with the theory that defendant had no intent to have sexual intercourse at the time he aided the girl in her travels. And the presumption of innocence would require the adoption of this theory if here the evidence stopped.”

This seems to me disposes of this case. Defendant had never had sexual intercourse with the girl, had never mentioned the subject to her, he never mentioned mistress or concubine to her, he does not appear to have mentioned sexual intercourse to her, when she of her own volition climbed up to the upper berth and slept with him in the Pullman while going to Reno. This is perfectly consistent with the theory of defendant's innocence.

In the Johnson case the Court held that the evidence did not thus stop but that it further showed that defendant had been in the habit of indulging in promiscuous sexual intercourse, that the girl was a prostitute, that defendant met her several years before in a brothel, that throughout their acquaintance they had always maintained

sexual intercourse and had frequently traveled about the country, always indulging in sexual intercourse. Then the Court said:

“This additional evidence furnished a basis from which the jury could justifiably draw the inference of fact that when the defendant furnished the transportation he did so for the purpose of having sexual intercourse with the girl after their arrival in Chicago.”

Here there is no such evidence. Defendant was not in the habit of having promiscuous sexual intercourse, the girl was not a prostitute, they had never had sexual intercourse with each other. Not only this, but defendant did not purchase the transportation.

The Court in the Johnson case held that the evidence was not sufficient to sustain the prostitution counts. That the telephone and telegraph messages contained no suggestion of prostitution, and that the fact that several days after the girl arrived in Chicago, defendant supplied her money with which to open and conduct a brothel was not sufficient. The Court said:

“This fact might lead to a suspicion that defendant, when providing transportation, had the intent to aid her subsequently in her profession, *but criminal convictions cannot be allowed to rest on suspicion.*”

In the case at bar, the evidence at most could only be claimed to raise a suspicion of the intent to have sexual intercourse, and this because of the fact that the defendant is a male and the transportation was of a female.

**The Court Erred in Allowing the Prosecuting Attorneys to
Constantly Comment.**

in their argument to the jury that defendant had failed to deny many material parts of the testimony while on the stand, and in instructing the jury that such failure to testify was a circumstance which the jury might consider indicating the defendant's guilt. This point is fully discussed in the opening brief.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. DREW CAMINETTI,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF THEO. J. ROCHE, SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL OF THE
UNITED STATES.

THEO. J. ROCHE,
*Special Assistant to the
Attorney General.*

JEREMIAH F. SULLIVAN,
Of Counsel.

Filed this.....day of November, 1914.

Filed

FRANK D. MONCKTON, Clerk.

NOV 30 1914

By.....Deputy Clerk.

F. D. Monckton,

Clerk.

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Note 1: Additional cases, especially very late Missouri cases repudiating and reversing the doctrine of the several Missouri cases cited in the brief of plaintiff in error, are shown in the addendum—additional authorities—at the end of this brief.

Note 2: This same subject matter is discussed in the reply brief filed by government counsel in the companion case, Diggs v. United States, No. 2404, at pages..... of that brief.

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No. 2405

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. DREW CAMINETTI,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF THEO. J. ROCHE, SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL OF THE
UNITED STATES.

I.

GENERAL STATEMENT OF THE CASE AND MAIN FACTS RELIED
UPON BY THE GOVERNMENT TO SUSTAIN CONVICTION.

The plaintiff in error has been convicted and sentenced under the first count of an indictment filed against him, in which it is charged that

“on the 15th day of January, in the year of our Lord, One Thousand Nine Hundred and Thirteen, in the city of Sacramento in the State and Northern District of California, then and there being, did then and there wilfully, knowingly, feloniously and unlawfully transport and cause to be transported, and aid and assist in obtain-

ing transportation for and in transporting in interstate commerce from Sacramento, in the State and Northern District of California, to Reno in the State of Nevada, over the line of railroad of the Southern Pacific Company, a certain girl, to wit: one Lola Norris, for the purpose of debauchery and for an *immoral purpose to wit: that the aforesaid Lola Norris should be and become the concubine and mistress of the said defendant;*

That the Southern Pacific is and was, the plaintiff then and there well knew, a common carrier engaged in the business of transporting and carrying passengers in interstate commerce, to wit: from the State of California to the State of Nevada, and did act in such capacity in bringing said Lola Norris from the State of California to the State of Nevada."

The indictment was framed under the act of June 25, 1910 (36 Stat. 825) entitled "An act to further regulate interstate and foreign commerce by prohibiting the transportation therein for *immoral purposes* of women and girls, and for *other purposes.*" (Italics ours.)

The second section of the act provides:

"That any person who shall knowingly transport or cause to be transported or aid or assist in obtaining transportation for or in transporting in interstate or foreign commerce * * * any woman or girl for the purpose of prostitution *or debauchery or for any other immoral purpose*, or with intent and purpose to induce, entice or compel such woman or girl to come a prostitute or to give herself up to debauchery or to *engage in any other immoral practice*; or who shall knowingly, procure or obtain or cause to be procured or obtained, or aid or

assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce * * * for the purpose of prostitution or debauchery *or for any other immoral purpose*, or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery *or any other immoral purpose*, whereby any such woman or girl shall be transported in interstate or foreign commerce * * * shall be deemed guilty of violating, etc."

Section 8 of the statute provides:

"That this act shall be known and referred to as the White Slave Traffic Act."

The main contention of the accused is that he is not a so-called "White Slaver" and that the immoral purpose and practices ascribed to him in the transportation of Lola Norris in interstate commerce from Sacramento, California, to Reno, Nevada, do not come within the inhibition of the statute for the reason that the purpose was not a commercial one on his part in that no profits were to accrue to him personally as the outcome of immoral practice on the part of the girl or the debauchery of the young woman. The claim is strenuously put forth that taking a woman to another state to make her his concubine or mistress, in no way constitutes an offense against the law. This identical question, in our judgment, has been determined adversely to the contention of the plaintiff in error, by the

Supreme Court of the United States and by other federal courts, as we shall show in a later subdivision of this argument.

It is not our purpose in this argument to follow with elaborate detail the many questions discussed at length in the four hundred page brief of the plaintiff in error. Many of them have been repeatedly discussed and disposed of in the various federal courts. The matters of substantive law involved and the rules proper to be stated by a trial judge for the guidance of the jury in passing on the facts, were so admirably stated in the charge of Judge William C. Van Fleet that we have taken the liberty of incorporating the same herein and adopting the same as a part of the argument. Aside from the clear statement of the law therein found this charge has not been printed in the record, and we deem it only fair to the court that it should be put in such form as to make it easily accessible to the several judges.

MAIN FACTS RELIED UPON BY THE GOVERNMENT.

The *dramatis personae* involved in the several scenes of female debauchment and male degeneracy covered by the indictment in the case at bar are: Maury I. Diggs, F. Drew Caminetti, Marsha Warrington and Lola Norris.

Maury I. Diggs was formerly architect for the State of California, and afterwards an architect of good business standing, having for offices three

rooms in the Diepenbrock Building in the City of Sacramento. He was the oldest of the four parties concerned. Among his business assets he possessed an automobile, which seems to have been used as well for his pleasures as for his business. He had a wife and young daughter, with whom he lived.

F. Drew Caminetti, plaintiff in error, was a slightly younger man, employed in a subordinate position in the office of the State Board of Control at Sacramento. He also was married and living with his young wife and two children.

The victims of the wiles of these two young men, in the persons wrongfully transported in interstate commerce, were two young girls, one about and the other under the age of twenty years.

Marsha Warrington was the daughter of T. H. Warrington, general agent in Sacramento of the Santa Fe Railroad Company. The father testified at page 232:

“I am the father of Marsha Warrington. Her mother died in 1898 when she was five years old. During the month of March, 1913, I resided at 1621 Eighteenth Street, Sacramento. I resided there with my family consisting of my wife, two daughters and my son. I never had met the defendant in this case under the name of F. Drew Caminetti. I knew a man by the name of Whitman. Prior to the month of March, 1913, I had known this man who went under the name of Whitman possibly four to six weeks. I first met him in my house. He called there for my daughter, Marsha Warrington.”

The witness then testified that the man whom he met in his house as Whitman was the defendant Caminetti.

From the time Marsha left school she had been employed by her father in his business (228).

She testified herself:

(228) "During the month of March, 1913, I was employed by my father. I had been employed by him from the time I left school.
* * * I know the defendant in this case, F. Drew Caminetti. I have known him since the latter part of last October, 1912. I know Maury I. Diggs. I was introduced to him last September."

She testified further that Diggs introduced Caminetti to her at the corner of Tenth and K streets. At page 228 she testified:

"That was the second time that I had ever seen Mr. Diggs. At the time of that introduction Miss Norris was also present. The appointment was arranged by telephone. Mr. Diggs telephoned to me, and Mr. Caminetti telephoned to Miss Norris and then Mr. Diggs telephoned to Miss Norris and then telephoned to me again. Between the first time I met Mr. Diggs and the second time, he had frequently telephoned to me but I had refused to see him. On the first occasion to which I had referred, when the four of us met for the first time, we went just for a ride in Mr. Diggs' machine. Mr. Diggs was driving the machine himself."

The remaining victim was the child of W. E. Norris, a retired railroad man of 1012 "P" Street, Sacramento.

Mr. Norris testified:

"I live at 1012 'P' Street, Sacramento. I have resided there for a great many years with my family consisting of my wife and daughter. My daughter's name is Lola Norris. She is the only child."

He also testified that Caminetti was introduced to him as Whitman.

Lola Norris testified:

(285) "During the early part of March, 1913, I was employed in the State Capitol in the Library. I had been employed in the Library of the State Capitol a little over a year. That was my first employment after leaving school. I am twenty now. I was twenty on the 3rd day of August, 1913. *In March, 1913, I was nineteen years of age.* * * * During the months of February and March, 1913, I went to school at night, I was taking up a course of stenography at night. I was attending a public school. I attended that school at night a month previous to going away, * * * three times a week from seven till nine. I went to night school to learn stenography because I was employed in the daytime. I know Miss Marsha Warrington. I have been acquainted with her for a number of years. *I know her quite well.* * * * I know the defendant in this case, F. Drew Caminetti. *I have known him a little over a year.* I met Mr. Caminetti at a dance at the Hotel Sacramento. I became more or less *intimately acquainted with him a year ago.* The first time I went out with Mr. Caminetti was the last part of October, 1912. * * * *Up to the latter part of October, 1912, he had never called at my house and I had never been out with him to any place. I know Maury I. Diggs. I first became acquainted with him the last part of October of last year.* That was

the occasion when I first went out with Mr. Caminetti. Mr. Caminetti rang me up on the phone one evening and *asked me if I would introduce him to Miss Warrington. He said that Mr. Diggs was anxious to meet her and that he would like to make the two of them acquainted.* At that time I had heard of Mr. Diggs but I had never seen him. I said I would introduce him to Miss Warrington. * * * I think the appointment at that time was made. In any event the four of us did meet. I received no communication other than from Mr. Caminetti regarding that meeting. On this first occasion we rode around in Mr. Diggs' automobile for about two hours."

The mutual introductions and the bringing together in close communication of these four proved to be the ruin of the two young girls.

Following this acquaintance, generated as above, between the four parties subsequently engaging in the Reno trip, so-called, the relations between the parties grew rapidly more intimate and more improper. Marsha Warrington, at pages 228-9, testified:

"I recall a trip to Reno which was taken upon the early morning of March 10, 1913. I don't know how many times we had been together from the time I first met Mr. Diggs up to the time we went to Reno. It varied. *Sometimes once or twice and sometimes three or four times a week. The meetings occurred with more frequency during the latter part of the period.* * * * During the latter part of that period we went out very frequently. * * * Mr. Caminetti called at my home. Mr. Diggs never called at my home. Miss Norris was attending night school. * * * During the

three or four or five weeks before I left upon the Reno trip, *the four of us would meet four or five times a week. Mr. Caminetti would get me at my home. We would then meet Mr. Diggs, then Mr. Caminetti would either go with us or would leave us and then meet Miss Norris at night school at nine o'clock, and the four of us would meet afterwards.*"

The meetings of the four parties were frequently held at late hours in the offices of Diggs in the Diepenbrock Building. Diggs and the Warrington girl occupying one of the rooms while Caminetti and the Norris girl would occupy the other. Such meetings frequently lasted until eleven o'clock at night.

As early as December, 1912, according to the testimony of Miss Warrington, Diggs had accomplished the ruin of Marsha Warrington, who before the time of the Reno trip had become pregnant. Some time thereafter a trip was made to San Francisco in the Diggs automobile. It was evidently brought about so far as the Norris girl was concerned by the invitation of Miss Warrington under the instigation of Diggs, and both girls were persuaded to take this trip upon the promise that when they reached the city they should be permitted to occupy a room by themselves. The parties went to a hotel where Lola Norris had never been before and Diggs and Marsha Warrington were assigned to one room.

Speaking of the visit to the hotel, Lola Norris testified:

(289) "We went to a hotel. I had never been there before. * * * *Mr. Diggs and Mr. Caminetti registered and the clerk showed us to rooms, Miss Warrington and Mr. Diggs to one room and Mr. Caminetti and me to an adjoining room. Mr. Caminetti did not make any mention regarding registering as husband and wife at all. After we got to the rooms I thought in order to avoid the suspicion of the clerk we would remain that way until he left and that then Miss Warrington and I would occupy one room and Mr. Diggs and Mr. Caminetti another, but as soon as the clerk left the room I went over towards the door of the room which Mr. Diggs and Miss Warrington occupied and just before I got there I heard the key turned in the lock and then I went over to the door and knocked and called to them but neither of them paid any attention to me. I knocked off and on for an hour or more and finally Mr. Caminetti told me that if I did not stop making so much noise, the clerk would come and put us all out and so I stopped. The room for Mr. Caminetti and I was a bedroom. Mr. Caminetti retired. He spoke to me about retiring but I refused to retire."*

Following this night of the parties in a San Francisco hotel, a visit was made by automobile by the four parties to San Jose and another hotel stay was made there.

Speaking of the San Jose experience Miss Norris testified:

(290) "We did not leave San Jose on Sunday night. Mr. Diggs said that he did not think he would be able to get home that night and that—this was in the presence of the defendant—the four of us were together on that

occasion—he said it was impossible for us to hope to get home to Sacramento that night; that we would have to stay over in San Jose; that if we started we would not get home until next morning anyhow and he thought we had better go to San Jose and stay all night there and leave early the next morning for Sacramento. I think that statement was made about six o'clock in the afternoon. The defendant spoke to me while I was in the room at the Grand Hotel and after I failed to attract the attention of Mr. Diggs and Miss Warrington, about getting into bed. I don't know the name of the hotel in San Jose to which we went the next night. We got to the hotel early, about nine o'clock. *Two rooms were obtained. Mr. Caminetti occupied a room with me. Mr. Diggs occupied a room with Miss Warrington. We left there next morning about half after two. Mr. Caminetti retired that night. He took his clothing off. I retired. I took my clothing off."*

Notwithstanding this situation, this witness at page 291 persisted that she did not there submit herself to Mr. Caminetti.

On a later occasion the parties in combination made a visit to Stockton, the same witness stating:

(292) "I just remember one occasion of going to Stockton. We went to a place called the Heidelberg. We retired to private rooms."

The testimony of the witness Marsha Warrington confirms the various details given by Lola Norris of the illicit relations that prevailed among these four young people.

The number and character of the meetings of the four were so frequent and so public that they attracted the attention of other people.

On account of the frequent assembling of the four at Diggs' rooms in the Diepenbrock Building, the janitor of that building called the fact to the attention of its owner. Even the families of Diggs and Caminetti became aware of the improper relations carried on by the two husbands with the two young women. Accordingly Diggs and Caminetti made up their minds to leave the State of California, at the same time insisting that their partners in their various escapades should accompany them and *live with them in some other place*, upon their promise to secure divorces from their respective wives with whom they were living unhappily and marry them.

At page 292, Lola Norris testified:

"I recall the 10th of March, 1913, the date upon which I left Sacramento. I first heard a discussion as to leaving Sacramento just about a week before we left. That discussion took place over the telephone. Mr. Diggs called me up over the telephone and discussed it. *Mr. Caminetti was with him and he also talked. Mr. Caminetti also telephoned at the same time.* Miss Warrington was at my house that afternoon. Mr. Diggs called me up on the phone. He said he had something very important that he wanted to tell Miss Warrington and me and said that Mr. Caminetti was with him there and he should like to take us for a ride and discuss the matter. *Then Mr. Caminetti came to the phone and talked and they both said there was something we ought to know and we should come out with them and no matter what would happen that we should come out and hear what they had to tell us* because it was to our advantage to know what it was. * * * I told him we

could not go out that afternoon and we did not go. That was all over the telephone up to that time."

(293) "I next saw Mr. Caminetti and Mr. Diggs on the next night, Monday night. * * * Mr. Diggs had told me that he was hiding at the Columbia Hotel and that it was absolutely necessary for him to leave town. *He told me I had better consider the matter and go with him; that it was just as necessary that I go as for them to go.* * * * Mr. Caminetti said that that was right; that anything Mr. Diggs said was true and that it was necessary we should go. During that entire hour we were discussing going away. Miss Warrington was not there that night. After I told Mr. Caminetti that I would not go away he said 'Well, I have to go anyway.' *He said if Mr. Diggs went he would go with him.*"

(294) "Between the first conversation to which I referred, occurring on the Sunday preceding the day of our departure, and the date of our departure, I talked about almost every night with Mr. Caminetti and quite a few nights when Mr. Diggs and Miss Warrington were present, too. Upon those occasions when I would meet Mr. Caminetti alone, that is not with Mr. Diggs, Miss Warrington was not present. *Upon those occasions when I and Mr. Caminetti would alone meet at night, I would remain in his company about an hour and a half or two hours.* * * *"

(295) "During these conversations that occurred between myself and Mr. Caminetti I said I would not go. I said I could not go because *I did not want to leave my parents at home. I did not know how my mother would stand the shock and I did not want to leave Sacramento.* I wanted to stay there. * * * During this conversation he did not state to which place I was to go. *We were to go away with them,*

Mr. Diggs and Mr. Caminetti. Upon those occasions when I and he were alone he said he was not living happily with his wife."

(296) "On Saturday before we left, that was the day before, Mr. Caminetti said that his wife would start action for a divorce as soon as she found out that he was gone and then we would be married."

Speaking of a previous conversation at the Columbia Hotel where Diggs was in hiding, Miss Norris testified:

(297) *"They said we had better decide to go away with them. They wanted us to go that night and we refused to go and we did not go. I told them that my mother was ill and I thought it would kill her if I went away. That was the night that Mr. Diggs told me that it took bullets to kill and that he knew that my mother would get over it all right. Mr. Caminetti said my mother would get over it and he knew she would feel a great deal worse if I stayed in town and put all this disgrace and humiliation on my family than if I did go away and there was just a little item in the paper about my disappearance.*

They said that their wives would start action for divorce just as soon as they found that their husbands had gone. Mr. Caminetti said that if his wife did not, he would get a divorce in a certain length of time if his wife had not taken any action. Mr. Caminetti said that we would be married after these divorces were granted."

At page 300 the witness was asked:

"Q. By the way, did Miss Warrington at any time prior to your departure from Sacramento ever invite or ask you or request you to go?

A. Miss Warrington and I talked about it when we were alone several times; we both had our opinions on the matter; *Miss Warrington never told me that I had to go or ask me to go or anything of the kind.*"

Speaking of a meeting at the Peerless Restaurant in Sacramento, on the day before their departure, witness said:

(300) "Prior to the termination of this conference at the Peerless Restaurant, no preparations of any kind had been made by myself to leave Sacramento nor by Miss Warrington to my knowledge."

Referring to a conference between herself and Miss Warrington at her house early on Sunday, the date of their departure, the witness testified:

(301) "She came to my house before we agreed to meet Mr. Diggs and we both agreed we would not go. She said she had thought it over during the night and I said I had done the same and *we decided to stay home and bear any disgrace or humiliation that might come to us and stand the disgrace.*"

At the conclusion of the meeting held in the Peerless Restaurant on the day before, it was arranged that Diggs and Caminetti should meet the two girls Sunday afternoon for the purpose of making final arrangements for their trip. After the conference had between the two girls on Sunday morning, as the result of which they concluded that they would not leave their homes, they met Diggs, pursuant to the appointment made the day before.

As to what transpired at this meeting, the same witness, Lola Norris, testified:

(301) "We said that if Mr. Diggs and Mr. Caminetti—*when we met Mr. Diggs, Miss Warrington told him we had decided not to go.* * * * He (Diggs) said that *Mr. Caminetti was at the present time getting some money to finance the trip; that he and Mr. Caminetti had an agreement between them to meet Miss Warrington that night; that we were to leave that night.* We talked to him for a long time and tried to persuade him to say that he thought it would be safe for us to stay in Sacramento. We told him we were willing to stay in Sacramento. He said it was absolutely foolish to talk that way; that if we were as familiar with affairs as he was we would not think of staying."

Apparently as the result of these frequent and long continued and persistent arguments—and entreaties on the part of Diggs and Caminetti the two young women were prevailed on to consent. At page 302 witness Norris says:

"We left Mr. Diggs about six o'clock. We went to Miss Warrington's home. She got a valise and put some clothes in it. From her home we went to my home. We sat on the porch about twenty minutes with my mother and father and then we left. I do not think I took anything with me. I took a few handkerchiefs. From my home we took the car to the Saddle Rock restaurant * * * When we reached the Saddle Rock restaurant, Mr. Diggs and Mr. Caminetti were there."

(303) "We were in a box. The four of us remained together about half an hour before any member of the party separated. We dis-

cussed different places to which we would go. * * * Mr. Diggs thought Salt Lake would be a good place, but then decided that that was rather a long trip and he was afraid that he did not have enough money to finance it. Then Los Angeles was suggested but Mr. Diggs said we could not go there because he was too well known there. Then I believe either he or Mr. Caminetti suggested Reno and we decided to go to Reno. Mr. Caminetti gave me \$20 to buy my ticket * * * We were to take the train at 10:40, I believe the first train was, for Reno. Mr. Caminetti did not get back in time so we took a later train. * * * When we agreed on Reno just before Mr. Caminetti left he gave me \$20. I don't know whether he wanted me to buy my own or to buy my own and Miss Warrington's together. Immediately after that Mr. Diggs said that he would buy the tickets. He said that if Miss Warrington and I went separately and bought our tickets it would be sure to cause some suspicion and he said we would be much more likely to carry the affair off successfully if we would go all together. He said somebody ought to manage the party; that if each one wanted to follow his own inclination we would never make any headway at all. He said some one would have to manage the party and the others would have to abide by his decisions; and so *Mr. Caminetti said 'I will make you the boss'*, and so Mr. Diggs took charge of the party. *Mr. Caminetti and Mr. Diggs were to share the expenses.* After that Mr. Caminetti left."

While waiting for Caminetti's return, the party waited in the Saddle Rock Restaurant for him.

At page 304, Miss Norris said:

"We waited there for some time and then Mr. Caminetti finally appeared. He said he

had been having quite a time trying to locate the party who was to give him the money; that he finally succeeded in finding him and he secured the money and we all went down to the depot again. We reached the depot about fifteen minutes before the train left. Mr. Diggs went to the ticket office and bought the tickets. We got in the train. The car we got into was a Pullman sleeper. There was a vacant section in the Pullman car and Mr. Diggs asked if there were not a vacant drawing room, and the conductor said yes, there was one that was not occupied, so Mr. Diggs gave him six dollars, I believe it was, and took the drawing room. Mr. Diggs gave the railroad tickets to the conductor."

At page 305 the witness further testified. The witness speaking of the drawing room said:

"I think it was made up before we went in. We went in there; the drawing room was made up before we went in. Mr. Diggs and Miss Warrington occupied the lower berth and I lay on the couch for about half an hour and then Mr. Caminetti and I occupied the upper berth. * * * "

(306) "We remained in those berths all night. We arose the next morning, I think it was about eight o'clock. The next morning Mr. Diggs said that he and Mr. Caminetti would go out just as soon as we arrived in Reno and rent a cottage and we would live there. There were some names discussed and it was finally agreed that Mr. Caminetti would go under the name of Mr. Ross and Mr. Diggs would go under the name of Mr. Enwright."

At Reno, the parties the first night occupied adjoining rooms in the Riverside Hotel,—Diggs and

Miss Warrington occupying one room and Caminetti and Miss Norris the other. Their names were noted on the hotel register by Diggs and Caminetti as Enwright and wife and Ross and wife. While Caminetti and Diggs were away from the hotel looking for a place to occupy in Reno, the girls remained at the Riverside Hotel.

Speaking of their return, Miss Norris testified at page 306:

“Upon the return of the two men to the hotel on Monday afternoon or evening, they said they had rented a bungalow. The next morning I recall going out to the bungalow with Mr. Caminetti. When we reached the bungalow we met Mr. Diggs and Miss Warrington and some man who was there taking an inventory of the articles in the house. The four of us continued to occupy that bungalow until Friday morning, I think it was. I occupied the rear bedroom with Mr. Caminetti. Miss Warrington slept in the front part with Mr. Diggs. Upon the three nights that I occupied this rear room with Mr. Caminetti, upon retiring we both disrobed. * * * During the three nights that I was there in the bungalow I had sexual intercourse with Mr. Caminetti.”

The witness persisted that this occasion in Reno was the first time that Caminetti had fully accomplished his purpose, and counsel for Caminetti in their brief call attention to that statement.

After three days of experience in the bungalow friends of the girls in Sacramento became apprised of their presence and had the parties apprehended by Chief of Police Hillhouse of Reno and the party was broken up.

Among the matters strenuously insisted upon by counsel for plaintiff in error is one that there was no specific intent that any immoral purpose should be accomplished as a result of or in connection with the interstate transportation. Attention is called to this language found at page 280 of the record:

“Mr. ROCHE. I would like to ask just one question with your honor’s permission. Q. Miss Warrington, you were asked on cross-examination what the specific intent was with which the four of you went to Reno; what the conversation was among the four of you, yourself, Miss Norris, Mr. Diggs and Mr. Caminetti, as to what would be done by the four of you just as soon as you did reach Reno?

A. We were to live there until they secured their divorces, which would be in six months.

Mr. ROCHE. Q. Live where and with whom?

A. Mr. Diggs and Mr. Caminetti.”

Aside from this evidence, however, which is a conclusive answer to the claim thus advanced by plaintiff in error, the record is replete with evidence showing that the paramount purpose and specific intent with which the trip was taken, so far as Diggs and Caminetti were concerned, was to live and cohabit with Marsha Warrington and Lola Norris.

The relations proved to have existed between the parties prior to the Reno trip, the frequent and promiscuous intercourse taking place between them, their travels to San Francisco and San Jose, the late night meeting oftentimes occurring at Diggs’ office and events there transpiring, their expressed

intention, oftentimes repeated, of making these two women their wives, their conduct in the Pullman car whilst speeding towards Nevada, the manner in which the parties registered at and temporarily resided in the hotel at Reno, the renting of the bungalow for their occupancy and the long period for which they stated they desired to rent this habitation, the manner in which they lived in this bungalow and the sexual relations there sustained, are conclusive upon this point.

As bearing upon this question, the very late case of *Johnson v. United States of America*, decided by the United States Circuit Court of Appeals, Seventh Circuit, January, 1914, is directly in point. There Judge Baker, speaking for the court, said:

“On the evidence thus far cited, a suspicion might be entertained that the purpose of the transportation was sexual intercourse. This evidence also is consistent with the theory that defendant had no sexual intent at the time he aided the girl in her travels. And the presumption of innocence would require the adoption of this theory if here the evidence stopped. But the record further establishes that before aiding this girl defendant habitually indulged in promiscuous sexual intercourse; that this girl was a prostitute; that defendant first met her several years before in a brothel; that throughout the period of their acquaintance they maintained sexual relations; and that frequently defendant in his journeys about the country took the girl with him or had her travel to meet him, and always for the purpose of sexual intercourse. *This additional evidence furnished a basis from which the jury could justifiably draw the infer-*

ence of fact that when defendant furnished the transportation he did so for the purpose of having sexual intercourse with the girl after their arrival in Chicago, just as a jury may reject a defendant's protestation of innocence in passing counterfeit when the evidence shows that prior to the act in question he had habitually or frequently passed other similar counterfeits."

Shortly thereafter and on the 6th of May, the indictment under the White Slave Act was filed in San Francisco. The indictment was in four counts, the first of which has been set out on a preceding page. That involved the charge that the transportation to Reno of Lola Norris was that she should be and become the concubine and mistress of Caminetti.

The second count charged that the transportation in the case of Marsha Warrington was that she should be and become the concubine and mistress of Maury I. Diggs.

The third count charged Caminetti with wilfully, unlawfully, feloniously and knowingly persuading, inducing and enticing and causing to be persuaded, induced and enticed, and aiding in such inducement and persuasion, Lola Norris to make the trip in order that she should become the concubine and mistress of the said defendant;

The fourth count was similar to the third, the purpose of the criminal action being to induce Marsha Warrington to become the concubine and mistress of Diggs.

At the conclusion of the trial the jury found a verdict of guilty against the defendant on the first count and not guilty on the other three.

II.

CHARGE GIVEN BY JUDGE VAN FLEET TO THE JURY.

The record of the trial in this case has not been printed. Being in typewritten form it is not so easy of access to the judges of this court as if printed. For that reason as well as for others already stated it is deemed proper at this point to give the charge of the trial court stating in the clearest possible language the substantive law involved, and likewise stating the rules proper for the government of the jurors in considering the important questions presented.

A further reason for giving the charge of the trial judge in his own language is that in the 400 page brief of plaintiff in error he has been arraigned and practically charged with grievous error amounting to misconduct in his rulings as shown by his charge and by the admission and exclusion of evidence during the trial.

We herewith give the charge as a clear statement of the law on the subject.

“Gentlemen of the jury, I ask your careful attention while I submit to you the principles of law that obtain in this case, and when I have done so it will be your duty to observe them and apply them to the evidence for the purpose of reaching your verdict, to the ex-

clusion of any suggestions that may have been made by counsel either here or through the newspapers, or that may have come to your attention from any other source.

The defendant at the bar, F. Drew Caminetti, is on trial under an indictment charging him with a violation of an act of Congress denominated the White Slave Traffic Act, being a statute intended and having the purpose to suppress the transportation in interstate commerce of women for immoral purposes. I shall proceed at once to define and interpret that act to you so far as it is here involved, that is, tell you what it means in its different aspects as applied to the acts charged against this defendant, that being a duty devolving upon the Court under the law; and it will be equally your duty under your oaths to apply such interpretation to the evidence and find your verdict in subordination thereto, even though perchance some one or more of you may entertain the thought that the law should be otherwise. That is to say, it is your duty, equally with mine, to administer the law as we find it, regardless of our individual views or sentiments as to its policy or expediency. I take occasion to emphasize this because of the fact that it has come to your attention during the empanelment of this jury, and perhaps from items appearing in the press, that there exists some diversity of sentiment as to the policy of this statute, as it has been interpreted by the Supreme Court of the United States; but with these diverse views you and I have nothing to do. In my judgment, the act as thus interpreted is a good one, as making in the interests of public morals and decency; but if I thought otherwise it could make no difference to my obligation to do my part toward aiding in its enforcement; and precisely the same obligation rests upon you.

That act, so far as here involved, provides, in substance, that any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute, or to give herself up to debauchery, or to engage in any other immoral practice; or who shall persuade, induce or entice, or cause to be persuaded, induced or enticed, or aid or assist in persuading, inducing or enticing, any such woman or girl to be transported in interstate commerce for any such immoral purpose, shall be deemed guilty of a felony, and punished as therein provided.

You will observe that the statute is very comprehensive in its language. It covers several different acts, each one of which is made a criminal offense under its provisions; those here involved being, first, the transporting or aiding in the transportation in interstate commerce of a woman or girl for such immoral purpose or with the intent to induce, entice or compel her to give herself up to such immoral purpose; and, second, the persuading, inducing or enticing any such woman or girl to be so transported in interstate commerce for such immoral purpose. These different acts constitute separate offenses under the statute. Under the first it is an offense to transport or aid in the transportation of such woman or girl for the purpose denounced, whether she goes of her own volition or is induced to go by the means stated in the statute, and whether she is to commit the immoral acts specified with the person so transporting her or with some other person or persons; and under the second phase of the statute above outlined it is an offense

to persuade, induce or entice such female to be so carried or transported for such immoral purpose whether the act of immorality is to be committed with the person so persuading, inducing or enticing her or with another or others.

So far as the several acts charged against the defendant are concerned, it is not essential under the statute that force or compulsion shall be employed to induce or accomplish the transportation of the woman or girl for the purposes there denounced. She may go freely and voluntarily, and even of her own desire, so far as the act of transportation is concerned; in other words, she need not be confined or restrained by physical means to any extent.

It is not necessary that the transportation of the woman or girl be had in company with the person procuring or aiding in its procurement. It is sufficient to constitute the offense that the person charged procured or aided or assisted in procuring such transportation to be accomplished for the purpose denounced in the statute, whether he personally accompanies the woman or girl so transported or not.

As to the second phase of the act above referred to, that of persuading, inducing or enticing, it is not essential to guilt under these terms that any particular means or method shall be employed. The terms persuade, induce and entice are used in the statute in their ordinary popular sense, and imply simply the act of employing the arts of entreaty, allurement, promises or similar means to influence the mind or inclination of the woman or girl and induce her to consent to be transported in interstate commerce for such immoral purpose.

The term interstate commerce, so far as here involved, means transportation or carrying from one state to another, and such transportation may be by means of a railroad or any other

mode of carriage usually employed by common carriers of passengers.

The indictment in this case is framed in four separate counts, which you will find to cover and include the several acts denounced in the statute as I have outlined them above, and charges the acts of the defendant as having relation to two different women or girls, with reference to whom it is charged the statute has been violated by such defendant. The uniting of the several different acts or offenses charged in one pleading or indictment is proper under the Federal statutes.

In the first count of the indictment it is charged that on the 15th day of January, 1913, at Sacramento, in this state, the defendant wilfully, knowingly, and feloniously, unlawfully transported and caused to be transported, and aided and assisted in obtaining transportation for, and in transporting, in interstate commerce, from the City of Sacramento to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific Company, one Lola Norris for the purpose of debauchery and for an immoral purpose, to wit, that said Lola Norris should be and become the concubine and mistress of the defendant.

The second count is a precisely similar charge against the defendant with reference to one Marsha Warrington, the only difference being that the immoral purpose alleged is that the said Marsha Warrington should be and become the concubine and mistress of one Maury I. Diggs.

In the third count it is charged that on that date, at the City of Sacramento, the defendant wilfully, unlawfully, feloniously, and knowingly persuaded, induced and enticed and caused to be persuaded, induced and enticed, and aided and assisted in persuading, inducing and enticing, said Lola Norris to go from said City of Sacramento to said Reno in interstate com-

merce over said line of railroad, for the purpose of debauchery and for an immoral purpose, to wit, that she should be and become the concubine and mistress of the defendant.

And the fourth and last count charges that on that date, at the City of Sacramento, the defendant committed the same act as the last with reference to the girl Marsha Warrington for the immoral purpose that she should be and become the concubine and mistress of said Maury I. Diggs.

The terms concubine and mistress, as employed in the counts of the indictment just read to you, mean, for the purposes of this case, a woman or girl who cohabits with a man without being his wife; a paramour; that is, one who lives with a man and has sexual relations with him, without being his wife; and to constitute which relationship it is not necessary that such cohabitation or living together shall continue during any fixed or definite period of time.

The term debauchery, as used in the statute, and alleged in the indictment, may be best understood by first ascertaining the meaning of the verb. To debauch is to lead away from purity; to corrupt in character or morals; to pollute; to seduce from the paths of virtue. A man debauches a woman when, by insidious approach, through kind attentions, rides, drives, theatres, gentle compliments, protestations of affection accompanied by caresses, or like methods, he first gains her confidence and love, and then, by taking her to questionable resorts, plying her with intoxicating drinks or other similar means, he breaks down her sense of delicacy, perverts her moral nature and arouses her animal passions, and thus seduces her to lewd actions such as illicit sexual relations or commerce. When this result is accomplished it

constitutes debauchery within the meaning of this statute.

And in this connection I instruct you that the purpose for which it is charged in this indictment the transportation of each of these girls was had constitutes debauchery and an immoral purpose within the meaning of the statute in question.

You will furthermore understand that this statute applies alike to married and unmarried men. Both are equally amenable to its provisions, and the degree of responsibility for a violation is the same without reference to their status in that regard.

To this indictment the defendant has interposed a plea of not guilty, which puts in issue the facts alleged in each count of the indictment, and thereby casts upon the Government the burden of proving the material averments of each count as to which it asks a conviction to your satisfaction to a moral certainty and beyond a reasonable doubt,—a term I shall hereafter define to you. It is not essential, however, that the Government establish the truth of the charges contained in all of the counts to entitle you to convict the defendant upon any. You may convict the defendant upon any one or more of the counts of this indictment, or acquit him upon any one or more, as the evidence may warrant under the principles I shall hereafter state to you. In other words, you may convict the defendant upon one or more counts and acquit him upon others accordingly as your judgment, based upon the evidence in the case, may dictate.

And in this connection I should state to you that while the different counts of the indictment allege that the acts therein charged were committed by the defendant on the 15th day of January, 1913, it is not necessary or material that the evidence of the Government shall show

that such acts or any of them were committed on that particular date. It is sufficient under the law if it appear that they were committed at any time within three years prior to the finding of the indictment. The evidence on the part of the Government tends to show that the acts embraced in the several counts were committed in the month of March of the present year, and, the indictment having been found after that date, if the evidence satisfies you in other respects of the guilt of the defendant of any of the acts so charged, the fact that such acts were committed in March instead of January of the present year would not constitute a variance affecting the material rights of the defendant, or prevent you from convicting him thereof.

You will observe that in each count of the indictment the specific purpose and intent of the defendant in committing the particular criminal act therein charged is alleged. The existence of this intent at the time of committing any of the acts charged is made essential under the statute to constitute an offense, that is, that the act be committed to accomplish the immoral purpose denounced, since there must exist a union of act and intent. It is, therefore, essential to the guilt of the defendant under any one of these counts that you find the existence of this intent at the initiation of any such act. That is one of the substantive elements necessary to constitute a violation of the law in question. The intent need not, however, be formed for any fixed period of time before the act is committed. It is sufficient if it coexists with the commission of the act. The intent or purpose with which a given act is committed, however, need not be shown by any open declaration of the party charged that such was his intent. It may be deduced from the circumstances shown in the evidence, including all

the acts done or statements made by the defendant, either orally or in writing, and by the acts and declarations in his presence of those, if any, concerned with him in carrying out the transaction. In other words, it is to be gathered by the jury from these sources by applying their reason and judgment to the evidence and making the deductions therefrom which men of ordinary experience and observation in the affairs of life would naturally draw. When the intent is thus made manifest, and the jury are able to so find, it satisfies the law and is sufficient, if the other elements are shown, to sustain guilt. Of course, it is an inference or deduction but it is a very usual and proper one. Indeed, if such were not the law it would be rare that the specific intent of a defendant in doing a particular act could be established. Men committing a wrongful act do not ordinarily proclaim in any open, definite manner the real purpose or intent with which the act is done, and, therefore, unless it could be inferred from the circumstances surrounding it, the real intent could in most instances not be established.

As I have heretofore intimated in your presence during the course of this trial, it is immaterial under the statute here involved what the character of the two girls involved in these charges was at the time of the acts charged, so long as the intent with which such acts were done is shown to the satisfaction of the jury; that is to say, if it appears in this case to your satisfaction that the defendant committed the acts charged in any one or more of these counts for the purpose alleged therein, it is wholly immaterial, except in so far as it may affect your consideration of her testimony, or the motive with which she was intended to be transported, whether the woman or girl involved in the particular charge was at the time

a lewd or immoral woman or a woman of chaste character. In other words, the act in question denounces the carrying in interstate commerce, for the immoral purposes specified, of any woman or girl, and a defendant violates the act when he does any of the things prohibited thereby, regardless of the fact as to whether the woman or girl who is the subject of his act be lewd or chaste, or whether or not he has himself previously had illicit intercourse with her. The act is intended primarily to suppress the traffic against which it is aimed, and incidentally is intended as much for the protection from further temptation and wrong of women or girls who have already entered upon or been seduced to a lewd course as for those whose lives have previously been innocent of wrong.

The burden of proof in this case, as in all other criminal prosecutions, is upon the Government, and it is not necessary for a defendant to offer evidence in disproof of any allegation of the indictment until the facts proven, if unrefuted by him, are sufficient to establish his guilt. The law, in its charity, presumes the innocence of a defendant, and that presumption abides with him throughout the trial and until his guilt is established by the evidence. The showing of a mere probability of guilt is not sufficient. Before a conviction may be had it is incumbent upon the Government to prove the guilt of a defendant by evidence which, as I have heretofore stated, satisfies the minds of the jury beyond a reasonable doubt, and that means by evidence which satisfies their minds to a moral certainty, and which accords with their reason and judgment to an extent which would induce them to act in the important affairs of life. As a great jurist has well expressed it, a reasonable doubt arises when the jury, after a fair and impartial consideration

of all the evidence in the case, are unable to say that they feel an abiding conviction to a moral certainty of the truth of the charge; a certainty which satisfies the reason and directs the understanding of those who are bound to act conscientiously upon it. If, therefore, after a full consideration of the evidence presented, the jury are conscientiously able to say that they entertain such a doubt as to the guilt of the defendant under any count of this indictment, they must resolve that doubt in his favor by an acquittal as to such count; and, of course, if you entertain such doubt as to all the counts, then you should acquit him on all. This applies to the jury as a whole and to each member of it, since in a criminal case the verdict must be unanimous; and this degree of proof must obtain as to each independent fact or circumstance relied upon to show guilt; that is, each essential fact or circumstance in a chain necessary to establish guilt must be sustained to the same degree of certainty, since a chain is truly said to be no stronger than its weakest link.

And where circumstantial evidence is relied upon in whole or in part for a conviction, such circumstances should not only be in harmony with the guilt of the accused, but they must be such that they cannot reasonably be true in the ordinary course of things and the defendant be innocent.

But you will not understand from this that the Government is called upon, under any of these counts, to make a case free from any possible doubt, that is, to prove the defendant's guilt to an unassailable demonstration. Such is not the law, for such proof is rarely obtainable in dealing with human transactions. In other words, the doubt which will justify your hesitation must be based in reason and arise upon the evidence and not consist of a mere fanciful hesitation growing out of your sym-

pathies, or based upon something other than a fair and impartial consideration of the evidence in the case.

As I believe I stated to you early in the trial, the fact that an indictment is brought against a defendant constitutes no evidence of his guilt. That is merely a formal instrumentality provided by the law as a means of bringing a defendant to trial, and subserves such purpose alone.

In determining the guilt of the defendant you may consider the fact that the law presumes a defendant to have a fair character for the traits involved in the charge until the evidence has established the contrary, and this presumption of good character goes in aid of the presumption of innocence and is to be considered by you with the evidence in the case in determining the guilt or innocence of the defendant. It is an element tending to some degree to show innocence, since the law presumes that a man of good character will not as readily engage in a criminal enterprise as one who is shown to have had a previous bad character. You should therefore give this presumption due consideration with the other evidence in the case in determining the defendant's guilt; but you will understand that notwithstanding the fact that his character is presumed to be good, such fact should not deter you from finding a verdict adversely to him under this indictment if you are satisfied from the evidence as a whole, after giving due consideration to such presumption, that his guilt has nevertheless been established.

While, as I have stated, it is the duty of the Court to declare the law and that of the jury to be governed by it in their consideration of the evidence, it is, on the other hand, the province and right of the jury to pass upon the facts in the case and the credibility of the witnesses.

With those functions the Court has nothing to do, other than to endeavor to see that only proper evidence is permitted to go before the jury for their consideration; and it is neither the right nor the disposition of the Court to interfere with that duty of the jury. If, therefore, during the progress of this trial you have gathered or during this charge should gather any impression from anything which the Court may have uttered in your presence, as to the views or judgment of the Court on the question of the defendant's guilt or innocence, or as to the weight of any evidence or the credibility of any witness, you will disregard such impression, should it not accord with your own views, and base your finding upon your own independent judgment as to what the sum of the evidence discloses; and when I refer to the evidence I refer solely to such evidence as has been finally permitted to go in and remain before you for your consideration. And in this connection I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness stand or in the way of exhibits or other physical objects which may have been laid before you.

In determining the credibility of a witness you will bear in mind that every witness is presumed to speak the truth; but this presumption may be overcome by the manner in which he testifies or the character of his testimony. The jury should take into consideration his character and conduct as disclosed, his relation to the controversy and to the parties, if any, his expressed or apparent bias or partiality, the reasonableness or unreasonableness of the statements he makes, and all other elements which tend to throw light upon his credibility. The

manner of the witness is to be observed, and the testimony he gives tested by the rules of reason and common sense. You note how far his evidence accords with the other facts as proven in the case; how far it is inconsistent with those facts, how far it is probable or improbable in itself or when viewed in the light of the other evidence on the question as to which the testimony of the witness has been addressed, and from all these considerations you determine the weight which you will give to his statements. The fact that a witness appears to be merely mistaken as to some feature of his evidence does not necessarily discredit him in other respects, although it may properly make you more careful in the consideration of the other features of his testimony; but if a witness comes upon the stand and testifies to what you believe, in view of the other evidence in the case, to be a deliberate falsehood, uttered with an intent to deceive, then you have a right, in your wisdom, to discredit all his testimony and to discard it from your consideration, unless the other evidence in the case satisfies you that in some respects he has told the truth. This applies to all the witnesses alike.

Where a defendant takes the witness stand, his evidence is to be judged by the same rules which are applied in determining the credibility of any other witness. That is, he is not to be discredited merely upon the ground that he is the defendant. You are to accord him the same fair and impartial consideration of his testimony, when viewed in the light of all the other facts in the case, as you would the testimony of a witness standing in any other relation to the case; but in passing upon his credibility you have a right, precisely as with any other witness, to consider the interest he has in the result of the trial, and determine for yourselves how far that interest may have

tended to color his statements or cause him to deviate from the truth. If, when tested by these rules, his testimony does not accord with your reason as being true, then you are not required to believe it.

Where a witness testifies to statements or verbal declarations or admissions of a defendant or of another witness, purporting to have been made on some occasion previous to, and more or less remote from, the trial, you have a right, in determining the weight you will give to such testimony, to consider with the matters I have heretofore stated to you the length of time elapsing since such statements are testified to have been made, whether the memory of the witness with reference thereto appears to be clear and well-preserved, or otherwise, and whether he was at the time such declarations are claimed to have been made in a position to hear and fully apprehend their true import and meaning, and any other attendant circumstance which would be calculated to throw light upon the correctness of his evidence.

In other words, in this, as in all other respects in your examination of the evidence of the different witnesses, you are to consider it from a reasonable, sensible, every day point of view, so to speak. You should be neither too credulous nor too skeptical in your attitude of mind. An eminent writer upon the law of evidence has aptly said that unbounded credulity is the attribute of weak minds that never thing or reason at all; while unlimited skepticism belongs only to those who make their own knowledge and observation the exclusive standard of probability. You should avoid both of these extremes, and give your judgment as the result of your intelligent discrimination as reasonable and practical men.

Where the facts in a case are equally open to two reasonable constructions, one favorable and

the other unfavorable to the defendant, the jury should adopt that construction which is favorable to the defendant rather than that which is against him; and when an act shown to have been committed by a defendant is capable of two constructions, one consistent with his innocence and the other tending to establish his guilt, the jury should adopt the construction consistent with his innocence. These principles have their basis in that same rule of charity which gives rise to the presumption of innocence. But these principles do not require the jury to ignore the obvious, natural and reasonable tendencies of the evidence, and if, giving the defendant their full benefit, you are nevertheless satisfied, upon a consideration of the entire case, of his guilt, it will be your duty to unhesitatingly so declare by your verdict.

In view of the fact that the two young women, Lola Norris and Marsha Warrington, who are involved in the charge against the defendant, have been referred to several times during the trial as prosecuting witnesses, I should state to you that this prosecution is not being carried on by these young women or either of them. This prosecution is in no aspect a private one, but is instituted and being carried on by the United States Government for the purpose of vindicating the law which it claims has been violated, and with a purpose of punishing the defendant for such violation if the jury shall find that he has been guilty thereof, and of having such punishment operate as a deterrent in preventing others from violating the statute in question. While the witnesses Lola Norris and Marsha Warrington have testified in support of the Government's case, their evidence was given by them merely as witnesses and not as prosecutors of the indictment.

You will bear the principles I have stated in mind and apply them to the evidence in the case in determining the guilt or innocence of the defendant under the several counts of the indictment.

As I have indicated to counsel in passing upon the defendant's motion to instruct the jury to acquit, the evidence introduced before you by the Government, if believed by you, is sufficient in its legal aspects, that is, in law, to make a case against the defendant under each one of those counts, but whether it is such as to satisfy you of its truth and establish the guilt of the defendant to the degree I have indicated is, as I have heretofore stated, a question solely for your consideration.

As has been stated to you by defendant's counsel in their argument, one of the most material facts left in this case for your determination in reaching a verdict is as to the purpose or intent with which these girls were transported to Reno on the occasion in question, should you find that they were so transported. Upon this question the defendant has introduced the evidence of several witnesses, and has himself testified, to facts tending to show certain threats emanating from the father of Maury I. Diggs, and the wife of the latter, and others, and communicated to himself and his companion Diggs, from which it is claimed that their sole actuating motive in leaving Sacramento was to escape arrest and exposure and possible personal violence at the hands of the father of one of the girls. This evidence is all before you for your consideration in connection with the other evidence in the case bearing upon that subject. The defendant, however, in his testimony, did not in any express or direct way touch upon the Reno trip, or specifically state what his purpose or intent was in taking these girls, or either of them, with him, if you

find they were so taken; nor has he testified as to what the facts or incidents of that trip were,—confining himself to a statement of certain things occurring before that trip was taken, and their effect upon his state of mind. Now it was the defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, as has been stated to you by counsel for the Government, to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule that applies to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence.

If, therefore, you find that these girls were transported to Reno by the defendant and his companion Diggs in the manner claimed by the prosecution, and the evidence in behalf of the defendant as to the motive or intent with which such transportation was had is not such as appeals to your hard, practical reason and common sense, in the light of all the other evidence and when all the acts of the defendant are con-

sidered, you are not compelled to believe it. As aptly suggested by one of defendant's counsel in his argument, there is a homely adage that actions speak louder than words; and the truth of this is quite as pertinent in its application to judicial inquiries as in the ordinary affairs of life. If, therefore, you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Diggs cohabited with them in the manner stated, then you may find that they were taken there with such purpose and intent. That is, if the evidence on behalf of the defendant as to his actuating motive in taking these girls with him on that occasion does not accord with his acts, you may discard that evidence if it does not carry conviction to your minds and base your finding as to his intent upon the acts committed by him.

And even should you find that the defendant and his companion Diggs were actuated in their departure or flight from Sacramento by a fear of exposure or arrest, but that nevertheless in taking these two girls with them there existed the intention to subject them to the immoral purpose charged, then you will be justified in finding the defendant guilty. If that immoral purpose was one motive inducing him to take these girls with him, it would matter not that he may also have been actuated by his fears or other consideration moving him to take that trip; he would nevertheless be guilty.

As to the question, which has been argued by counsel, whether the evidence is sufficient to show that the defendant transported or aided or assisted in transporting these girls to Reno, you will understand that it is not necessary to sustain this charge that the defendant be shown to have himself paid for the tickets or other expenses of that trip. If he contributed to the

means for paying such expenses, or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs, this would be sufficient upon which to sustain the charge that the defendant aided and assisted in such transportation.

Now, gentlemen, with these suggestions I submit this case to you. My duty is finished and the case rests in your hands. Perhaps I should again admonish you that to no extent must you permit yourselves to be influenced in your verdict by the fact that this case has attracted great public attention and given rise to so much controversy in the public press, the halls of Congress, and among the people prior to this trial by reason of certain incidents arising in its earlier history. Those facts are wholly extraneous to your inquiry or mine, and we have nothing whatsoever to do with them. They in no way affect the merits of the case, and you should be careful to avoid permitting any feeling of bias or prejudice arising therefrom to find reflection in your verdict.

And moreover, as I have suggested to you during the progress of the trial, you should be careful to avoid permitting any comments that may have been made in the newspapers during the progress of this case, and which may have fallen under your observation, to influence your verdict to any extent. It matters not what the nature of such comment may have been—whether it had relation to the appearance, manner, or testimony of the defendant or of a witness, or as to a ruling of the Court. The witnesses and their credibility are to be judged solely by the principles that I have stated to you, independently of any such comment; and the rulings of the Court, if in any wise erroneous, are to be reviewed only in a proper tribunal. For the purposes of the verdict you are to assume that those rulings have been made in

subordination to the rules of evidence or other principles of law affecting the particular question under consideration, and confine your consideration solely to the determination whether under the sworn evidence, and the law as administered by the Court, the defendant is innocent or guilty.

And in this connection, gentlemen of the jury, perhaps I should suggest to you, although I doubt if it is absolutely necessary, that you must refrain from permitting your verdict to be tinged to the slightest extent by any of those natural feelings of sympathy which may arise out of consideration of the fact that this defendant may have relatives whose sorrow will be elicited in the event that he is convicted or whose joy will be brought about in the event of his acquittal. We are all subject to such sentiments. I doubt if any of you have them more deeply imbedded in your makeup than myself but I cannot permit myself to be actuated by them nor can you to any extent whatsoever without abandoning the principles upon which we are bound to proceed and decide this case.

Now, gentlemen of the jury, in accordance with the principles I have suggested to you, and in view of the fact that the indictment contains several counts, the Clerk will have prepared different forms of verdict, which you will find to meet your necessities. Should your consideration of the evidence result in your finding this defendant guilty upon each and all of these counts, then you may find a general form of verdict, simply stating that you find the defendant guilty as charged. That will imply a finding of guilt upon each and all of the counts in the indictment. Should you in your wisdom reach the conclusion that the defendant is guilty upon certain counts in the indictment and not guilty as to others then there is

a form which affords an opportunity to express such verdict. Should you agree as to the guilt or innocence of the defendant upon one or more counts, but be unable to reach an agreement as to others, then you may return a verdict as to those counts upon which you so agree and report your inability to agree as to the others. And, of course, as I have heretofore stated, should you entertain a reasonable doubt as to the guilt of the defendant under any one or more of those counts, or all of them, then you must give him the benefit of such doubt by your verdict."

III.

THE WHITE SLAVE TRAFFIC ACT WAS A CONSTITUTIONAL EXERCISE OF POWER BY THE CONGRESS OF THE UNITED STATES.

The statute known as the "White Slave Traffic Act" is correctly set out as an appendix to the brief of plaintiff in error. It was passed on the 25th of June, 1910.

The leading case on the subject of the power of Congress to enact the so-called White Slave Traffic Act is *United States v. Hoke*, originally determined on April 6, 1911, by the District Court of the Eastern District of Texas. The matter as there presented is thus referred to by the Court Reporter, 187 Fed. 993:

"Effie Hoke and another were indicted for alleged violation of Act of Congress, June 25, 1910, c. 395, 36 Stat. 825, prohibiting the furnishing of transportation for or the persuading,

enticing, or inducing of a woman to go from one state to another as a passenger in interstate commerce for immoral purposes.”

In his opinion, Russell, District Judge, says:

“The indictment under consideration was drawn under the act of June 25, 1910, c. 395, 36 Stat. 825, which sought to make it a felony to furnish transportation or to persuade, entice, or induce a woman or girl to go from one state to another as a passenger in interstate commerce for the purpose of prostitution or debauchery, where the furnishing of such transportation or the inducement, persuasion, or enticement aforesaid is followed by the woman actually being transported in interstate commerce for the purpose of prostitution or debauchery.

(4) The demurrers of the defendants in this case assailed the sufficiency of the indictment, among other reasons, upon the ground that the act of Congress under which the indictment was drawn was an unconstitutional exercise of power. It is contended by defendants that no power was granted to Congress by the Constitution to enact legislation of the character in question, and this contention brings sharply before the court the duty of deciding whether the act of June 25, 1910, is constitutional.

The power of Congress to pass this legislation must be found in two articles of the federal Constitution:

‘Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. * * *

‘Congress shall have the power to pass all laws which are necessary and proper for carrying into execution the foregoing powers, and

all other powers vested by this Constitution in the government of the United States or in any department thereof.' Article I, Sec. 8.

Upon these two clauses of the Constitution must depend the power of Congress to pass the act under which the indictment in this case was drawn."

The matter was determined by the Supreme Court of the United States on appeal on January 24, 1913, 227 U. S. 308, 326; 57 Law. Ed. 523, the opinion in the case and in several kindred cases, being by Mr. Justice McKenna of that court.

In the course of the opinion, the following language is found (525 Law. Ed.):

"The charge against Effie Hoke is that she did, on the 14th day of November, A. D. 1910, in the city of New Orleans and state of Louisiana, unlawfully, feloniously, and knowingly persuade, induce and entice one Annette Baden, alias Annette Hays, a woman, to go from New Orleans, a city in the state of Louisiana, to Beaumont, a city in the state of Texas, in interstate commerce, for the purpose of prostitution.

The charge against Basile Economides is that he did unlawfully, feloniously, and knowingly aid and assist the said Effie Hoke to persuade, induce, and entice the said Annette Baden * * * to go in interstate commerce * * * for the purpose of prostitution, * * * in the said city of Beaumont, Texas.

The second and third counts make the same charge against the defendants as to another woman, the one named in the third count being under eighteen years.

The demurrers were overruled, and after trial the defendants were convicted and sentenced, each to two years' imprisonment on each count. 187 Fed. 992."

After quoting the language of the several sections of the statute, Mr. Justice McKenna, speaking for an undivided court, says:

“The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or states is not material to be considered. It is the supreme law of the land, and persons and states are subject to it.

Congress is given power ‘to regulate commerce with foreign nations and among the several states’. The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And, besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some one of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercises of it and made a ground of attack. The present case is an example.

Commerce among the states, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move, or be moved in interstate commerce. And the act under consideration was drawn in view of that possibility. What the act condemns is transportation obtained or aided, or transportation induced, in interstate commerce, for the immoral purposes mentioned. But an objection is made and urged with earnestness. It is said that it is the right and privilege of a person to move between states, and that such

being the right, another cannot be made guilty of the crime of inducing or assisting or aiding in the exercise of it, and 'that the motive or intention of the passenger, either before beginning the journey, or during or after completing it, is not a matter of interstate commerce'. The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one state to another. 29 Stat. at L. 512, chap. 172, U. S. Comp. Stat. 1901, p. 3180; *United States v. Popper*, 98 Fed. 423. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. *Lottery Case (Champion v. Ames)* 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561. It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise, as in the instances stated, and which finds further illustration in *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506. This constitutes the supreme fallacy of plaintiffs' error. It pervades and vitiates their contentions.

Plaintiffs in error admit that the states may control the immoralities of its citizens. Indeed, this is their chief insistence; and they especially condemn the act under review as a subterfuge and an attempt to interfere with the police power of the states to regulate the morals of their citizens, and assert that it is in consequence an invasion of the reserved powers of the states. There is unquestionably a control in the states over the morals of their citizens,

and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the states. We have cited examples; others may be adduced. The pure food and drugs act is a conspicuous instance. In all of the instances a clash of national legislation with the power of the states was urged, and in all rejected.

Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions; and surely, if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and more insistently, of girls.

This is the aim of the law, expressed in broad generalization; and motives are made of determining consequence. Motives executed by actions may make it the concern of government to exert its powers. Right purpose and fair trading need no restrictive regulation, but let them be transgressed, and penalties and prohibitions must be applied. We may illustrate

again by the pure food and drugs act. Let an article be debased by adulteration, let it be misrepresented by false branding, and Congress may exercise its prohibitive power. It may be that Congress could not prohibit the manufacture of the article in a state. It may be that Congress could not prohibit in all of its conditions its sale within a state. But Congress may prohibit its transportation between the states, and by that means defeat the motive and evils of its manufacture. How far-reaching are the power and the means which may be used to secure its complete exercise we have expressed in *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364. There, in emphasis of the purpose of the law, are denominated adulterated articles as 'outlaws of commerce', and said that the confiscation of them enjoined by the law was appropriate to the right to bar them from interstate transportation, and completed the purpose of the law by not merely preventing their physical movement, but preventing trade in them between the states. It was urged in that case, as it is urged here, that the law was an invasion of the power of the states.

Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the congressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects. It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the act of June 25, 1910, and we need go no farther in the present case.

The principle established by the cases is the simple one, when rid of confusing and distract-

ing considerations, that Congress has power over transportation 'among the several states'; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Cooley*, Const. Lim. 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress."

The Supreme Court of the United States affirmed the judgment of conviction. Following its judgment, a petition for rehearing was filed by distinguished counsel for the plaintiffs in error, in which the following positions were taken:

"Having carefully examined the opinion of the Honorable Court, we think that, with propriety, we may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to the plaintiffs in error on the following grounds, briefly treating of the constitutionality of the White Slave Act under which these plaintiffs in error were convicted, and confining our petition for a rehearing on the facts to the matters complained of in plaintiffs' in error's brief. * * *

Article IV, Section 2, of the Constitution of the United States, reads:

'The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'

The White Slave Act is contrary to and contravenes this provision of the Constitution in that though they are generally and justly deemed immoral, yet prostitutes, both male and

female, are citizens of their respective States with all the 'privileges and immunities' possessed by any other citizen; and one of their 'privileges' is to travel interstate; and so long as this privilege exists as a lawful right, it is the 'privilege' and lawful right of any other citizen to aid and assist, persuade and entice, them to take the journey, regardless of their motive or purpose and regardless of the motive and purpose of the one rendering the aid, as to what they shall do or intend to do at the end of their journey.

Article I, Section 8, Subdivision 2, of the Constitution of the United States, reads:

'The Congress shall have Power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".'

The White Slave Act is unconstitutional in that it does not come within the terms of this provision of the Constitution, for the reason that while the carrying of passengers interstate comes within 'the power to regulate commerce', the motive or intent of the passenger either before beginning the journey, or during, or after completing it, is not a matter of interstate commerce.

In the opinion of this Honorable Court, we are cited to the case of the United States vs. Popper, 98 Fed. 423, holding that Congress has the power to prohibit the carrying of obscene literature and articles designed for indecent and immoral use from one State to another; and to the case of Champion vs. Ames, 188 U. S. 321, 357, holding that Congress has the power to suppress the traffic in lottery tickets through national and interstate commerce. Also reference is made to the Pure Food and Drugs Act. In each of these instances Congress has dealt with the visible, tangible and corporeal thing, and has regulated and controlled the movement, in

interstate commerce of an object or objects having a physical existence.

Under the provisions of the White Slave Act, Congress is regulating and controlling the animus of the citizens of the several States while journeying in interstate travel, or before commencing the trip, or after completing it, and is, therefore, governing and regulating the transportation of an intangible and incorporeal thing, not perceptible to the touch, which cannot be a matter of interstate commerce. Under this Act, Congress is controlling matters in contemplation, or in the minds of the persons affected, and not *in esse*.

The Act is void in that it conflicts with the reserved police powers of the States individually to regulate or prohibit prostitution or any other immoralities of their citizens.

The Amendments IX and X to the United States Constitution were intended as emphasizing the retention of reserved powers to the States in all cases save those which expressly delegated powers to Congress.

The Congress of these United States, as a legislative body, is one of limited powers prescribed by the Constitution, and can pass no valid enactment unless it comes strictly within some one or more of the provisions conferring the power; and that all powers not so expressly granted to Congress, by the Constitution, were reserved to the States individually.

When the States granted the power to Congress 'to regulate commerce between the States' it was intended as a strict limitation to regulating commerce as such and as the common understanding would interpret it, and they did not intend that it should ever be extended by implication into interfering with, regulating or aiding the reserved police powers. It is no argument to say the States individually could not forbid an interstate journey to prostitutes,

or to those aiding or assisting in such journey, for the simple reason that each State has the power absolutely to suppress prostitution within its borders, even to the radical extent of making it a capital felony; and to say the State has no such power to prohibit such interstate carriage of prostitutes is but a further exposure of the object of the bill to interfere with the police power of the States to regulate the morals of their citizens. Chief Justice Fuller speaking for the Court in *United States vs. Knight Co.*, 156 U. S. 12, 39 L. Ed. 329, says:

‘That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police powers of the State.’

We, therefore, submit the proposition that, under our view, the Act is unconstitutional, and should be so held by the Court.”

Notwithstanding this persistent suggestion that the act was unconstitutional, rehearing was denied and the opinion announced by Mr. Justice McKenna has become not only the declared, but the established law of this country.

On the same day on which the Supreme Court of the United States disposed of the case of *Hoke v. United States*, several other decisions were made with reference to charges under the same White Slave Traffic Act.

The cases were:

Athanasaw v. United States, 227 U. S. 336;
Bennett v. United States, 227 U. S. 333;
Harris v. United States, 227 U. S. 340.

The opinion in each case was by Mr. Justice McKenna. In each case the constitutionality of the statute was upheld. We ask attention to some of the expressions in the *Athanasaw* case, reported in 57 Law. Ed. 528, 531. At page 530 the court says:

“Three propositions are presented by defendants: (1) The gist of the offense is the intention of the person when the transportation was procured or aided to be procured. (2) The word ‘debauchery’, as used in the statute, means sexual intercourse. (3) The act did not intend to prohibit the transportation of women for the purpose of any other vice or immorality than that applicable to sexual actions.

The instructions requested by the defendants presented these propositions, and by refusing them and giving others inconsistent with them it is contended that the court erred. The ruling of the court is sufficiently exhibited by the instructions which it gave, and they can be made the basis as well of a consideration of the errors assigned by the refusal of the instructions requested by defendants.

The instructions given by the court are as follows:

“The intent and purpose of the defendants at the time of the furnishing of this transportation for Agnes Couch is the very gist and question in this case. Did they intend to induce or entice or influence her to give herself up to debauchery? It makes no difference whether the profits which would be made by the defendants came from the sale of liquor or other immoral purpose. The question here is of intent; what was the intent with which they brought her; that she should live an honest, moral and proper life? or that she came and they engaged and contracted with her for the purpose of her entering upon a condition which might be termed

debauchery, or lead to or would necessarily and naturally lead her to, a condition of debauchery just referred to?

The term "debauchery" is not a legal or technical term. There is no allegation that the defendants brought her here with the purpose or with the intent to debauch her; but to induce her, or entice her, or influence her to enter upon a course of debauchery. The term "debauchery" is not a legal or technical term. To debauch is to corrupt in morals or principles; to lead astray morally into dishonest and vicious practices; to corrupt; to lead into unchastity; to debauch. Debauchery, then, is an excessive indulgence of the body; licentiousness, drunkenness, corruption of innocence, taking up vicious habits. The term "debauchery", as used in this statute, has an idea of sexual immorality; that is, it has the idea of a life which will lead eventually, or tends to lead, to sexual immorality; not necessarily drunkenness or immorality; but here it leads to the question in this case as to whether or not the influences in which this girl was surrounded by the employment which they called her to did not tend to induce her to give herself up to a condition of debauchery which eventually, necessarily, and naturally would lead to a course of immorality sexually. That is the question for you to determine, and it is a question that you alone can determine. You have heard the testimony in the case in regard to the circumstances in which she was placed. You have viewed the scene where she was employed. You have examined by the testimony and your observation what was the character and what was the condition or influence in which the girl was placed by the defendant. Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman?

Now, it is contended that they must have had a deliberate intent to debauch her when she came here; that either one or the other intended to debauch her or to get somebody else to debauch her. Now, that term debauch is used in a great many instances in the law, and the usual connection is to have carnal intercourse with; but there is no such language in this statute, nor is it the language of the indictment. The charge of the indictment in substance is that they induced or influenced her to enter into a life or condition of debauchery,—“to induce or compel her to give herself up to debauchery.”’

The language of the statute is directed against the transportation ‘of any woman or girl for the purpose of prostitution or debauchery, or *for any other immoral purpose*, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice’.

The instructions of the court were justified by the statute. It is true that the court did not give to the word debauchery or to the purpose of the statute the limited definition and extent contended for by the defendants, nor did the court make the guilt of the defendants to depend upon having the intent themselves to debauch the girl or to intend that some one else should do so. In the view of the court the statute has a more comprehensive prohibition, and was designed to reach acts which might ultimately lead to that phase of debauchery which consisted in ‘sexual actions’. The general expressions of the court, however, were qualified to meet and not go beyond the conduct of the defendants. The court put it to the jury to consider whether the employment to which the defendants called the girl and the influences with which they surrounded her tended ‘to induce her to give herself up to a condition of de-

bauchery which eventually and naturally would lead to a course of immorality sexually'. That question, the court said, the jury should determine, and further: 'You have heard the testimony in the case in regard to the circumstances in which she was placed. You have viewed the scene where she was employed. You have examined by the testimony and your observation what was the character and what was the condition or influence in which the girl was placed by the defendants. Was or was not it a condition that would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman?' The plan and place justified the instructions. The plan might have succeeded if the coarse precipitancy of one of the defendants and the ribaldry of the habitues of the place had not shocked the modesty of the girl. And granting the testimony to be true, of which the jury was the judge, the employment to which she was enticed was an efficient school of debauchery of the special immorality which defendants contend the statute was designed to cover."

In considering the matter we ask the court to bear in mind that the title of the statute is much broader than section eight. The title is as follows: "An Act to Further Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls and for Other Purposes." The language could not well be broader.

Counsel for plaintiff in error, at some length, call attention to the fact that the author or sponsor for this statute, Representative Mann, apparently dis-

agrees with the several judgments reached by the Supreme Court with reference to the purpose of Congress in the enactment of this law.

The matter under discussion in the House of Representatives when the report of the Mann Committee was made was more particularly the power of Congress to enact legislation on this subject, in view of the powers of the states to originate police legislation. But in the reports in the House of Representatives, reference is made to the case of *United States v. Bitty*, reported first in 155 Fed. 938, and subsequently reported on appeal in 208 U. S. 393; 52 Law Ed. 543, 547.

The position taken by the accused in the case at bar was identical in that case with the position taken by District Judge Hough of the Circuit Court for the Southern District of New York, when he announced his decision on December 10, 1907. The act there involved was not the so-called White Slave Traffic Act, but the Immigration Law. At pages 939-940 (155 Fed.) the judge used this language:

“It may be that, as the court remarked in the case cited, this defendant is guilty of an open violation of the divine law and of grossly immoral acts, so that such a case is not ‘the most favorable for a dispassionate consideration of questions of law, the decision of which involves the question whether the party defendant shall be punished, or discharged as not guilty of any offense cognizable by the statute’. It is, however, necessary to apply to this statute, as to any other, the ordinary rules of con-

struction, concerning which the discussion at bar has not revealed any substantial difference of opinion between opposing counsel.

It may be admitted that the immigration act of 1907 is in its general scheme remedial; and it is not denied that it is the duty of the court to give to each intelligible word of the statute its exact and precise meaning according to common understanding of the intent of the Legislature, so far as ascertainable from legal sources; and that intent, if expressed in apt language, must be enforced as long as the statute is in operation, though the result be cruel or ridiculous. So far as this statute is concerned I have been directed to no indication of legislative intent other than the language of the statute itself, except the report of the committee of the House of Representatives on immigration, made to the Fifty-ninth Congress at its first session (No. 4,912), wherein it is stated that the scope of section 3 of this statute is extended beyond that of the corresponding section of the act of 1903, 'so far as it relates to the immigration of prostitutes, in order effectively to prohibit undesirable practices alleged to have grown up'. This I take to mean that the words 'or for any other immoral purpose' have been added to the word 'prostitution', in order to prevent undesirable practices alleged to have grown up in relation to the immigration of prostitutes. Upon general principles the added words must be understood as meaning 'for any other like immoral purpose', so that the question becomes this: whether a man who brings his mistress into this country is committing an act ejusdem generis with bringing in a prostitute.

Concubinage is the act upon the part of the woman who is cohabiting with a man without ceremonial marriage, or consent and intent good at common law. A discussion of the difference

between this status and that of the prostitute would be both needless and nauseating. It suffices to say that from any point of view, historical, social, or legal, I do not think that the mistress is near enough to the prostitute to be included by general words in a statute directed against the latter unfortunate class."

The view of the circuit judge was not adopted by the Supreme Court of the United States when its opinion was announced by Mr. Justice Harlan, as follows:

"This is a criminal prosecution under an act of Congress regulating the immigration by aliens into the United States.

By the act of March 3d, 1875, chap. 141, relating to immigration, it was made a felony, punishable by imprisonment not exceeding five years and by fine not exceeding \$5000, for any one knowingly and wilfully to import or to cause the importation of women into the United States for the purposes of 'prostitution'. 18 Stat. at L. 477, U. S. Comp. Stat. 1901, p. 1285.

By the act of March 3d, 1903, chap. 1012, it was provided: 'That the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold any woman or girl for such purposes in pursuance of such illegal importation, shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years, and pay a fine not exceeding five thousand dollars.' 32 Stat. at L. 1213, 1214.

A more comprehensive statute regulating the immigration of aliens into the United States was passed on February 20th, 1907. By that act

the prior act of 1903 (except one section) was repealed. The 3d section of this last statute was in these words: 'That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and, on conviction thereof, be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States, and shall be deported as provided by sections twenty and twenty-one of this act.' 34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1907, p. 389.

The defendant in error, Bitty, was charged by indictment in the circuit court of the United States for the southern district of New York with the offense of having unlawfully, wilfully, and feloniously imported into the United States from England a certain named alien woman for '*an immoral purpose*', namely, '*that she should live with him as his concubine*'.

We come now to the merits of the case, and they are within a very narrow compass. The earlier statutes, we have seen, were directed against the importation into this country of alien women for the purposes of prostitution. But the last statute, on which the indictment rests, is, we have seen, directed against the importation of an alien woman 'for the purpose of prostitution *or for any other immoral purpose*'; and the indictment distinctly charges that the defendant imported the alien woman in question '*that she should live with him as his concubine*'; that is, in illicit intercourse, not under the sanction of a valid or legal marriage. Was that an immoral purpose within the meaning of the statute? The circuit court held, in effect, that it was not, the bringing of an alien woman into the United States that she may live with the person importing her as his concubine not being, in its opinion, an act *ejusdem generis* with the bringing of such a woman to this country for the purposes of 'prostitution'. Was that a sound construction of the statute?

All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution'. It refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement'. *Murphy v. Ramsey*, 114 U. S. 15, 45, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747, 764.

Congress, no doubt, proceeded on the ground that contact with society on the part of alien women leading such lives would be hurtful to the cause of sound private and public morality and to the general well-being of the people. Therefore the importation of alien women for purposes of prostitution was forbidden and made a crime against the United States. *Now, the addition in the last statute of the words, 'or for any other immoral purpose', after the word 'prostitution', must have been made for some practical object.* Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for the purposes of 'prostitution'. In forbidding the importation of alien women 'for any other immoral purpose', Congress evidently thought that there were purposes in connection with the importation of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that, in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words 'any other immoral purpose' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis' Sutherland, Stat. Constr. Sec. 423, and authorities cited. But that rule cannot avail the accused in this case; for the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute, may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may right-

fully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse. We must assume that, in using the words 'or for any other immoral purposes', Congress had reference to the views commonly entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse. Those views may not be overlooked in determining questions involving the morality or immorality of sexual intercourse between particular persons. Chief Justice Marshall, speaking for the court, said that 'though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptance, or in that sense in which the legislature has used them, would comprehend. *The intention of the legislature is to be collected from the words they employ.* * * * The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.' *United States v. Wiltberger*, 5 Wheat. 76, 95, 96, 5 L. ed. 37, 42, 43. In *United States v. Winn*, 3 Sumn. 209, 211, Fed. Cas. No. 16, 740, Mr. Justice Story said that the proper course is 'to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature'. To the same effect are *United States v. Morris*, 14 Pet. 464, 10 L. ed. 543; *American Fur. Co. v. United States*, 2 Pet. 358, 367, 7 L. ed. 450, 453; *United States v. Lacher*, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625; *Sedgw. Stat. & Const. Law*, 2d ed. 282; *Maxwell, In-*

terpretation of Statutes, 2d ed. 318; Guided by these considerations and rules we must hold that Congress intended by the words 'or for any other immoral purpose', to include the case of any one *who imported into the United States an alien woman that she might live with him as his concubine*. The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute the importation of an alien woman brought here only that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose.

The judgment must be reversed, and the case remanded with directions to set aside the order dismissing the indictment and overrule the demurrer, and for such further proceedings as will be consistent with this opinion."

A still more recent case bearing on this same subject of commercial or commercialized vice, is that of *John Arthur Johnson v. United States of America*, determined by the U. S. Circuit Court of Appeals for the Seventh Circuit, January Session, 1914.

The accused in that case was one who, in one way or another, had achieved not only national but international reputation. The opinion of the Circuit Court of Appeals is by Baker, Circuit Judge.

The following is found in the opinion:

"Plaintiff in error, defendant below, was convicted of violating the White Slave Traffic Act, which makes it a felony for any one know-

ingly to 'transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, any woman or girl for the purpose of prostitution or debauchery or any other immoral purpose'.

One group of counts on which defendant was held charged that he procured the transportation of a girl from Pittsburgh to Chicago for the immoral purpose of having sexual intercourse with her. In another group the purpose laid was prostitution.

Respecting the first group the evidence showed that the girl, in financial straits at Pittsburgh, endeavored to reach defendant by long distance telephone; that an employee of defendant answered, and to him she told her plight; that the next day she received a telegram, signed 'Jack', asking what she needed for expenses; that in reply to her answer she received a telegram reading, 'I am sending you \$75. Go to Chicago at Graham's and wait until I get there. Jack'; that she drew the \$75 from the Postal Telegraph Company, purchased therefrom a ticket to Chicago, and traveled to that city on the Pennsylvania railroad; and that defendant shortly thereafter had sexual intercourse with this girl in Chicago.

No direct evidence was adduced to establish the authenticity of the telegrams. But from defendant's statement on the witness stand that he would not say that he had or had not sent them, from the fact that defendant on his arrival in Chicago called the girl by telephone at Graham's, and from the fact as testified to by the girl that defendant at their first meeting inquired, 'Did you receive the \$75 I sent you?' the jury were warranted in finding that defendant was the author of the messages and the furnisher of the money for the girl's transportation.

On the evidence thus far cited, a suspicion might be entertained that the purpose of the transportation was sexual intercourse. This evidence also is consistent with the theory that defendant had no sexual intent at the time he aided the girl in her travels. And the presumption of innocence would require the adoption of this theory if here the evidence stopped. But the record further establishes that before aiding this girl defendant habitually indulged in promiscuous sexual intercourse; that this girl was a prostitute; that defendant first met her several years before in a brothel; that throughout the period of their acquaintance they maintained sexual relations; and that frequently in his journeys about the country took the girl with him or had her travel to meet him, and always for the purpose of sexual intercourse. This additional evidence furnished a basis from which the jury could justifiably draw the inference of fact that when defendant furnished the transportation he did so for the purpose of having sexual intercourse with the girl after their arrival in Chicago, just as a jury may reject a defendant's protestation of innocence in passing counterfeit when the evidence shows that prior to the act in question he had habitually or frequently passed other similar counterfeits.

But a different situation affects the prostitution count. Telephone and telegraph messages contained no suggestion of prostitution. The only fact is that several days after the girl's arrival in Chicago defendant supplied the money to enable her to open and conduct a brothel. This fact might lead to a suspicion that defendant when providing transportation had the intent to aid her subsequently in her profession. But criminal convictions cannot be allowed to rest on suspicion. And there were no supplementary facts like those that support

the sexual intercourse counts—no proof that defendant had ever been connected with or interested in brothels or that prior to the act in Chicago he had ever aided this or any other girl to engage in prostitution.

Against upholding the conviction on the sexual intercourse counts defendant's first insistence is that the intention of Congress was otherwise. By noting current history we may be aware that the act, when applied to merely unlawful sexual intercourse, has been used as an instrument for blackmail or other oppressions; but that has nothing to do with a judicial ascertainment of the meaning and constitutionality of the act when it was adopted. Reference is made to public debates as indicative of the author's intent. But the writer of a bill may explain his purpose to fellow members and they may vote for it solely because in their judgment it has a wider or narrower scope than he states. This is one of the considerations that ages ago led to the universal primary canon of interpretation, that in the absence of ambiguity apparent upon the face of a document extraneous references are not permissible and the meaning is to be gathered exclusively from the text with the words taken in their ordinary and usual meanings.

A further urge is that the words 'prostitution or debauchery or other immoral purpose' do not cover sexual intercourse that is merely unlawful. 'Other immoral purpose' are words of such generality that a criminal conviction thereunder could not be tolerated for acts whose purpose was any and every sort of immorality. They must be limited to that genus of which the preceding descriptions are species. Defendant contends that the nexus, the attribute in common, is 'commercialized vice',—that a defendant cannot be guilty unless it be shown that he is financially concerned in 'the traffic in

women'. Prostitution, the first species, involves the financial element. *But there is no condition in the statute that the furnisher of transportation shall be guiltless unless he shares or somehow profits by the hire of the woman's body.* And in Hoke's Case, 227 U. S. 308, a conviction for transporting a woman 'for the purpose of prostitution' was upheld without proof that the woman was a 'white slave', an article of barter in 'the traffic in women' or that the defendant was interested in her earnings. Debauchery, the other named species, is restricted by its association with the first species to sexual debauchery, a leading of a chaste girl into unchastity. *No financial element is necessarily involved in sexual debauchery; the statute introduces no such condition;* And Athanasaw's Case, 227 U. S. 326, teaches that the providing of interstate transportation for the mere purpose of attempting to lead a chaste girl into unchastity is a felony without proof that the defendant intended to be the debaucher or that he expected to profit by the girl's hire if she should become a prostitute. So it becomes apparent that 'commercialized vice' or 'the traffic in women for gain' is not the common ground; that the nexus indicative of the genus is sexual immorality; and that fornication and adultery are species of that genus. This conclusion is fortified by U. S. v. Bitty, 208 U. S. 393, where in construing the prohibition of the immigration act against the importation of alien women 'for the purpose of prostitution or any other immoral purpose' the latter phrase was held to mean unlawful sexual intercourse regardless of financial considerations. See also U. S. v. Flaspoller, 209 Fed. 1006, in reference to the White Slave Traffic Act.

Lawful power in Congress to pass an act of this scope is challenged. There was a time when it would have been interesting to examine

the contention that the word 'commerce' in the Commerce Clause of the Constitution means only 'traffic in or an exchange of commodities'. But when the ultimate tribunal long ago definitely decided that the term also includes 'navigation and intercourse', that 'transportation of persons' in and of itself is 'commerce', and that 'commerce' may not only be 'regulated' but actually prohibited in the interest of the general welfare, no room was left for profitable discussion. *Passenger Cases*, 7 How. 283; *Gloucester Ferry Case*, 114 U. S. 196; *Rahrer's Case*, 140 U. S. 545; *Covington Bridge Case*, 154 U. S. 204; *Addyston Pipe Case*, 175 U. S. 226; *Lottery Case*, 188 U. S. 321; *Hoke's and Athanasaw's Cases*, *supra*. Whole ranges of acts, like those regulating carriers, safety appliances, employers' liability for injuries to interstate trainmen, hours of dispatchers' work, twenty-eight hour confinement to live stock, movements of diseased persons or animals, pure food, etc., are upheld only on the basis that 'transportation is commerce'. Nothing remains but to say that the present act obviously is concerned with the interstate transportation of persons. How far and with what governmental purposes the undoubted power shall be exercised must be determined by the legislature, not the judicial, department of government."

The law was sustained in a decision by District Judge Foster of the Eastern District of Louisiana, in *United States v. Flasboller*, 205 Fed. 1007.

The court there said:

"The indictment sets out that the woman was persuaded to go from one state to another for the purpose of engaging in illicit intercourse, cohabitation, and concubinage with the accused. Certainly illicit cohabitation and concubinage

are immoral acts analogous to prostitution, and come well within the letter of the statute.

The White Slave Act has been held to be constitutional (see *Hoke and Economides v. United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed., decided by the Supreme Court February 24, 1913), and is but a further declaration of the public policy of the United States as originally expressed in the immigration acts. In my opinion the case is on all fours with that of *United States v. Bitty*, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543, and the interpretation of the statute must be controlled by that decision." The demurrer will be overruled."

Another recent case upholding the statute is *Weddel v. United States*, decided by the Circuit Court of Appeals of the Eighth Circuit on March 30 of the present year, 213 Fed. 208.

Another recent case upholding the statute is *Latham v. United States*, decided in the Circuit Court of Appeals, Fifth Circuit, on January 20th of the present year, 210 Fed. 159.

Still another adjudication on the subject by the Supreme Court of the United States is

Wilson v. United States, 34 Sup. Ct. Rep. 347.

The court there, speaking by Mr. Justice Pitney, said:

"This case comes here upon two separate writs of error allowed upon the same record, to review judgments of the district court imposing fine and imprisonment upon each of the plaintiffs in error, upon their conviction on an indictment founded upon the act of Congress of June 25, 1910, commonly known as the white

NOTE: In the brief in the Diggs case and on the joint oral argument of both cases, much stress was laid on the point that error was committed in the comment by the trial judge and by counsel on the silence of defendant and his failure to deny or explain the incidents of the Reno trip while on the stand. In view of the importance attached to the matter by defendant's counsel, we have called attention in an "addendum" at the end of this brief to some late Missouri cases overruling the doctrine of the early Missouri cases cited and relied on by counsel for both plaintiffs in error, and to a long line of cases sustaining our position. The addendum immediately follows the closing page of this brief, the pages being numbered 259 to 265.

slave act (36 Stat. at L. 825, chap. 395, U. S. Comp. Stat. Supp. 1911, p. 1343).

The case was brought directly to this court because the constitutionality of the statute was drawn in question. This question has since been settled adversely to plaintiffs in error. *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905."

IV.

THE ACCUSED HAVING VOLUNTARILY TAKEN THE WITNESS STAND WAIVED ALL IMMUNITY—HIS SILENCE AND HIS STATEMENTS ALIKE ARE LEGITIMATE SUBJECTS FOR CRITICISM AND COMMENT.

Much of the brief filed by plaintiff in error is taken up by references to the alleged misconduct of counsel and to the error on the part of the court in that same connection, based on the fact that counsel and the court criticised the failure on the part of defendant to deny certain matters testified to by the witnesses Warrington and Norris. The text books and adjudicated cases alike show that there is no merit in this contention so repeatedly made by counsel in their brief.

The rule on the subject is thus stated in *12 Cyc.*, pp. 576-7:

"The statute which provides that the neglect or refusal of the accused to testify shall not be commented upon by the prosecuting attorney, is usually mandatory. This being so the prosecuting attorney should therefore maintain an absolute silence on the subject in his argument,

and any reference, direct or indirect, to the absence of the accused from the witness stand is generally deemed reversible error. Where, however, defendant goes on the stand as a witness, he occupies the position of any other witness and may be cross-examined and may be cross-examined to the same extent. The prosecuting attorney then has the same right to attack his credibility in argument or to comment upon his testimony or upon his failure or refusal to answer proper and material questions within his knowledge as in the case of any other witness.

The statute prohibiting counsel from commenting on the failure of the accused to testify in his own behalf does not apply either in the case where he is a witness for himself but fails to testify to material matters."

The rule is thus referred to in

Wharton's Criminal Evidence, Sec. 681:

"But if the defendant, having full opportunity to do so, failed on the stand to controvert that which was testified against him, this may be regarded, when the matter is one within his personal knowledge, as an admission of the truth of such testimony."

A case frequently cited on this subject is:

State v. Ober, 52 N. H. 459.

It is also reported in 13 American Reports, 88. At page 91 we find the following:

"The respondent was not bound to volunteer any statement concerning the matter of the charge against him, nor could he be compelled to disclose any fact, or answer any question which would expose him to another criminal prosecution, or tend to convict him in this.

Such immunity from confession, examination, argument or prejudicial inference, was his undoubted privilege; but he chose to waive it, and insisted on his right to testify; and having testified concerning a part of the transaction, in which it was alleged that he was criminally concerned, without claiming his constitutional privilege, it was too late for him to halt at that point which suited his own convenience. It is clear, upon reason and authority, that he might have been compelled to answer the question propounded by the State's counsel. It was material to the issue, if not directly involved in his own proffered testimony. At this point, for obvious reasons, he saw fit to close his lips, and the court allowed him to remain silent. Of this mistaken clemency he cannot now be heard to complain.

The whole argument of his counsel now proceeds upon the erroneous assumption that the ruling of the court was right. That assumption being groundless, his argument fails.

The views of so eminent a man as Judge Cooley seem to be adverse to those now expressed. He inclines to the opinion that a party accused of crime should be and is entitled, under statute of Michigan allowing the accused to give evidence in his own behalf, to disclose no more than he chooses—('if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself; and the statutory privilege becomes a snare and a danger.') Cooley's Const. Lim. 317; also p. 182.

The learned jurist does not furnish us with cases in support of his views, which, after such consideration of them as the great ability and learning of Judge Cooley compel, we cannot regard as being supported by authority or sound reason. But the statute of Michigan is peculiar. By its provisions the accused is allowed to make a statement to the court or jury, and may be cross-examined on any such statement. It has been held, says Judge Cooley, that this statement should not be under oath.

In speaking of this statute and of the right given to cross-examine the party who has made his statement, Judge Campbell says: 'And while his constitutional right of declining to answer questions cannot be removed, yet a refusal to answer any fair question, not going outside of what he has offered to explain, would have its proper weight with the jury.' *People v. Thomas*, 9 Mich. 321.

Upon the whole, we are unable to reach any other conclusion than that the respondent's testimony, so far as it went—and not less than the fact that it went no further—his refusal to submit to a full cross-examination, within proper limits, after waiving his constitutional privilege, and all his conduct and demeanor, were proper matters for comment by counsel and court, as well as for the consideration of the jury."

Following the case is a note by the reporter which is in the language following:

"Note.—To the third edition of his work on Constitutional Limitations, Judge Cooley appends (page 317) the following note relative to the foregoing case: 'By a recent case this paragraph appears to have led to some misapprehension of our views, and consequently we must regard it as unfortunately worded. Neverthe-

less, after full consideration, it has been concluded to leave it as it stands. What we intend to affirm by it is, that the privilege to testify in his own behalf is one the accused may waive without justly subjecting himself to unfavorable comments; and that if he avails himself of it, and stops short of a full disclosure, no compulsory process can be made use of to compel him to testify further. It was not designed to be understood that in the latter case, his failure to answer any proper question would not be the subject of comment and criticism by counsel; but on the contrary, it was supposed that this was implied in the remark that "it must be left to the jury to give a statement which he declines to make a full one, such weight as, under the circumstances, they think it is entitled to." All circumstances which it is proper for the jury to consider, it is proper for counsel to comment upon.'

The author then proceeds to state the above case of *State v. Ober*, and continues, 'we not only approve of this ruling but we should be at a loss for reasons which could furnish plausible support for any other. It is in entire accord with the practice which has prevailed, without question, in Michigan, and which has always assumed that *the right of comment, where the party makes himself his own witness and then refuses to answer proper questions, was as clear as the right to exemption from unfavorable comment when he abstained from asserting his statutory privilege.*'—Rep."

A case very frequently cited on this point is *Stover v. The People of the State of New York*, 56 N. Y. 315. On page 320 the court uses this language:

"The court, in substance, *charged the jury that they were at liberty to consider, as a cir-*

cumstance, the failure of the accused, while a witness, to give any account as to where the money found upon him had been kept in the interval from the time he claimed to have received it until it was so found. To this portion of the charge his counsel excepted. This raises the question as to the construction of section 1 of chapter 678 of Laws of 1869 (vol. 2, 1597). That section, among other things, provides that upon the trial of all indictments charging a criminal offence, the person charged, shall, at his own request, but not otherwise, be deemed a competent witness, but that the neglect or refusal of any such person to testify shall not create any presumption against him. The general rule is that, when it appears that a party charged with the commission of crime has the power, if innocent, to explain a fact or circumstance tending to show his guilt, fails to give such explanation, such failure may be considered as a circumstance against him. In the present case, the question is whether his failure to give any explanation of such a fact or circumstance, which he could do if innocent, when testifying in his own favor, he having requested to become a witness, comes within this general rule. The argument in behalf of the accused is, that he cannot be made a witness at all except by his own request, and that his failure to be a witness shall not create any presumption against him, and that if he requests to be a witness and becomes such he need give testimony only as to such parts of his case as he may choose; and as to other parts as to which he does not request or desire to give testimony, no presumption can be created against him for his failure to testify. In this construction I cannot concur. True, it is at the option of the accused whether or not to become a witness. When he has exercised this and become a witness he is made competent for

all purposes in the case; if by his own testimony he can explain and rebut a fact tending to show his guilt, if innocent, and he fails to do so, the same presumption arises from his failure that would arise from a failure to give the explanation by another witness, if in his power so to give it. The reason for the presumption is alike in both cases. It arises from the known desire of parties to repel or explain accusatory evidence against them, if in their power; and the basis of the presumption is that the case shows that it is in their power if innocent. Hence a failure tends to show an absence of innocence."

The rule was recognized in

People v. Mead, 145 Cal. 500.

The 5th subdivision of the syllabus, which is borne out by the case, is in this language:

"Where there had been evidence on the part of the prosecution satisfactorily showing that a legal marriage had been performed, and that the defendant had testified equivocally on that subject and denied the marriage, if at all, only by implication, it was not misconduct for the district attorney to comment upon his failure expressly to deny that the woman who was placed in the house of prostitution was his wife."

Another California case is

People v. Wong Bin, 139 Cal. 65-6:

"There is nothing in the point made as to the argument of the district attorney. The defendant had voluntarily gone upon the stand as a witness, and as such witness went fully into the details of the difficulty, claiming that the killing was in self-defense. Under these circumstances the district attorney was au-

thorized in commenting upon his failure to deny certain alleged statements testified to by other witnesses to have been made by him, inconsistent with his testimony given on the trial. (*Nevada v. Harrington*, 12 Nev. 125; *Stover v. People*, 56 N. Y. 315.) The question thus presented is very different from the case where the defendant is not a witness at all, or a witness only as to some formal matter."

State v. Harrington, 12 Nev. 129-131.

In that case the court said:

"Under the constitution of this state, no person accused of a crime can be compelled to testify against himself; but under the statute, at his own request, but not otherwise, he shall be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court. The statute further provides, that in all cases wherein the defendant in a criminal action declines to testify, the court shall specifically instruct the jury that no inference of guilt is to be drawn against him for that cause. (Comp. Laws, secs. 2305-6.) Courts have nothing to do with the wisdom or policy of a statute. Their only duty, in a proper case, is to enforce it.

Under the statute mentioned, in a case wherein the defendant in a criminal action declines to testify, the court shall specially instruct the jury as prescribed in the act. Certainly, there is nothing in the statute requiring the court to so instruct the jury in a case wherein he does not decline to testify; but, on the contrary, wherein he voluntarily makes himself a witness in his own behalf, as in this case. A defendant on trial in a criminal action, in this state, may plead not guilty, and thereafter sit in silence, or he may, at his option, testify for himself. *If he chooses the latter course, he is to be held*

and treated, so far as his testimony goes, like any other witness.

* * * ‘All circumstances which it is proper for the jury to consider it is proper for counsel to comment upon.’ (See, also, *State v. Ober*, 52 N. H. 462; *State v. Cohn*, 9 Nev. 179; *State v. Huff*, 11 Nev. 27; *Connors v. People*, 50 N. Y. 240.) *As affecting the right of the jury to consider, or of counsel to comment upon, the circumstances, we can perceive no difference between the refusal of defendant to answer a proper question upon cross-examination and neglecting to testify upon some material matter within his knowledge, proven against him by the prosecution.*

The authorities are somewhat conflicting upon the question whether or not, if the defendant in a criminal case voluntarily testifies, he can be compelled upon cross-examination to answer a proper question concerning any fact upon which he testified in chief. It being unnecessary to decide the question in this case, we express no opinion upon it.

Our conclusions are that, if the defendant in a criminal action voluntarily testifies for himself, the same rights exist in favor of the State’s attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses. Nor are the two cases cited by counsel for appellant (*People v. Tyler*, 36 Cal. 522; *People v. McGungill*, 41 Cal. 429), opposed to our conclusions.”

The rule is recognized and enforced by the Supreme Court of the United States in *Fitzpatrick v. United States*, 178 U. S. 304-316; 44 Law Ed. 1083. The court said:

“Error is also assigned in not restricting the cross-examination of the plaintiff in error. Defendant himself was the only witness put upon the stand by the defense, who was connected with the transaction; and *he was asked but a single question, and that related to his whereabouts on the night of the murder.* To this he answered: ‘I was up between Clancy’s and Kennedy’s. I had been in Clancy’s up to about half past twelve or one o’clock—about one o’clock, I guess. I went up to Kennedy’s and had a few drinks with Captain Wallace and Billy Kennedy, and I told them I was getting kind of full and I was going home, and along about quarter past one, Wallace brought me down about as far as Clancy’s, and then he took me down to the cabin and left me in the cabin, and we wound the alarm clock and set it to go off at six o’clock, and I took off my shoes and lay down on the bunk and woke up at six o’clock in the morning, and went up the street.’

On cross-examination *the government was permitted, over the objection of defendant’s counsel, to ask questions relating to the witness’s attire on the night of the shooting, to his acquaintance with Corbett, whether Corbett had shoes of a certain kind, whether witness saw Corbett on the evening of March 12, the night preceding the shooting, whether Corbett roomed with Fitzpatrick in the latter’s cabin, and whether witness saw anyone else in the cabin besides Brooks and Corbett.* The court permitted this upon the theory that it was competent for the prosecution to show every movement of the prisoner during the night, the character of his dress, the places he had visited, and the company he had kept.

Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it

is clear that the prosecution has a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defense, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury. (State v. Ober, 52 N. H. 459); and it is also held in a large number of cases that when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses."

The rule is also referred to in *Powers v. United States*, 223 U. S. 303-316; 56 Law Ed. 448.

At page 453 Law Ed. Mr. Justice Day says:

“There is some difference of opinion expressed in the authorities, but the rule recognized in this court is that a defendant who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to a cross-examination concerning his statement. ‘Assuming the position of a witness, he is entitled to all its rights and protection, and is subject to all its criticisms and burdens;’ and may be fully cross-examined as to the testimony voluntarily given. (Citing cases.) ‘Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection, and not for that of other parties, *and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure.*’ (Citing Green on Evidence, and other authorities.)

Sawyer v. United States, 202 U. S. 150-168;
50 Law Ed. 979.

In that case Mr. Justice Peckham, speaking for the court, said:

“Another question argued arises upon the cross-examination by the district attorney, of the plaintiff in error Adams, who voluntarily became a witness on the trial on his own behalf and in behalf of his fellow plaintiff in error. The cross-examination referred to the conduct of the witness on a previous voyage and on a different vessel, in regard to which nothing had been said on the examination of the witness in chief.

It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine

him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime. *Fitzpatrick v. United States*, 178 U. S. 304, 44 L. Ed. 1078."

Cotton v. State, decided by the Supreme Court of Alabama, 6 South. 372.

It was held in that case, as shown by the syllabus, that:

"Where defendant elects to become a witness in his own behalf, *his failure to explain criminating circumstances is a matter to be considered by the jury, and he is not protected from the criticism of the state's counsel by* *Crim. Code Ala. Sec. 4473, providing that his failure to become a witness shall not be a subject of comment by counsel.*"

A similar ruling was made in *Graves v. State*, also decided by the Supreme Court of Alabama, 7 South. 317.

Another Alabama case in which the rule is cited is *Clark v. State*, 78 Ala. 474.

In the last case cited the rule is thus stated, as shown by the syllabus:

"When a defendant becomes a witness in his own behalf, he waives his constitutional right for protection against compulsory self crimination. Like any other witness he must submit to cross-examination, and *his failure to explain any fact or circumstance within his knowledge, tending to exculpate him, is a proper subject of comment by the prosecution.*"

State v. Glade, decided by the Supreme Court of Kansas, 33 Pac. 8.

The rule in this case was thus stated:

“The testimony of a defendant so taking the witness stand and giving testimony to be considered by the jury, may be commented upon by counsel in the same manner as the other testimony in the case, and it is not error in such a case to permit counsel for the state to comment on his failure to testify with reference to material matters within his knowledge.”

In concluding this section of our argument referring to the misconduct of counsel and the alleged grievous errors of the trial judge in allowing comment on the failure of the witness to testify to certain matters given in evidence against him, it may be well to call attention particularly to the portion of Judge Van Fleet's charge which is involved. It is found at pages 439-440 of the record. It is in this language:

“As has been stated to you by defendant's counsel in their argument, one of the most material facts left in this case for your determination in reaching a verdict is as to the purpose or intent with which these girls were transported to Reno on the occasion in question, should you find that they were so transported. Upon this question the defendant has introduced the evidence of several witnesses, and has himself testified, to facts tending to show certain threats emanating from the father of Maury I. Diggs, and the wife of the latter, and others, and communicated to himself and his companion Diggs, from which it is claimed that their sole actuating motive in leaving Sacramento was to escape arrest and exposure and possible personal violence at the hands of the father of one of the girls. This evidence is all before you for your consideration in connec-

tion with the other evidence in the case bearing upon that subject. The defendant, however, in his testimony, did not in any express or direct way touch upon the Reno trip, or specifically state what his purpose or intent was in taking these girls, or either of them, with him, if you find they were so taken; nor has he testified as to what the facts or incidents of that trip were,—confining himself to a statement of certain things occurring before that trip was taken, and their effect upon his state of mind. Now it was the defendant's privilege to thus limit his testimony, and, being a defendant, he could not be required to say more if it was not his desire to do so; nor could he be asked in cross-examination as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts, you have a right, as has been stated to you by counsel for the Government, to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness-stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon his silence; but where a defendant elects to go upon the witness-stand and testify, he then subjects himself to the same rule that applies to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence."

This language of the charge as we read it is entirely in line with the various State and Federal

adjudications made on the subject. The main reliance of the counsel for the accused is on the case of

Balliet v. United States, 129 Fed. 689.

The instruction in that case bears no resemblance whatever to the instruction of Judge Van Fleet in the case at bar. The instruction is quoted at page 695 of the report in this language:

“It has been suggested that I have overlooked one thing. I may say you may consider in determining the question, the fact that the defendant having gone upon the witness stand, *if he has not fully explained, or has not explained matters which are material to the issues in this case*, and which are naturally within his knowledge, you may consider that as a circumstance tending to show that the facts *if explained would bear out the contention of the Government, and his failure to give them or to give a truthful explanation is against him.*”

This is vastly different from the language of the trial judge in the case at bar, who charged the jury that they might “take this omission of the defendant into consideration,” and who said further that his failure might not only be commented upon, but might be considered by the jury in connection with all the other circumstances in reaching their conclusion as to his guilt or innocence.

In commenting on the form of the instruction, Judge Thayer said in the *Balliet* case:

(695) “This rule of law would put the defendant in a criminal case in a peculiar attitude, but if he takes the stand as a witness *he*

*must perforce explain every fact and circumstance which has been put in evidence against him as tending to establish guilt, which a jury may deem material, and such as he could explain, at the risk of having them conclude, because of his silence with reference to such facts and circumstances, that they are true and that he is guilty. * * **

If a defendant in a criminal trial desires to take the stand and contradict some particular fact and circumstance which has been testified to, he cannot safely do so for fear of raising a *presumption of guilt* by his failure to explain other facts and circumstances in evidence which *the jury may happen to regard as material and may think the accused could explain. * * **

When the defendant in a criminal case in compliance with this statute (March 16, 1878) waives his constitutional privilege by taking the witness stand, he occupies the attitude of any other witness and may be cross-examined like an ordinary witness and to the same extent. *Fitzpatrick v. United States*, 178 U. S. 304. * * *

It is also doubtless true that, when a defendant in a criminal case takes advantage of the statute and testifies in his own favor, the Government may comment on his testimony and draw inferences therefrom as freely as if it were an ordinary witness and not the accused. * * * The instruction was of a nature which permitted the jury to draw unfavorable inferences against the accused because in the course of his examination he *had not alluded to every fact and circumstance already in evidence and, given an explanation thereof consistent with his innocence.* We are satisfied that the instruction cast an undue burden on the defendant and that it was also misleading."

The Balliet case, in our judgment, does not sustain the contention of counsel. But if it should be so considered it cannot stand as against the long line of Federal and State decisions cited by us in the preceding pages. The instruction given by the distinguished trial judge was in line with the vast line of adjudications made by the Supreme Court of the United States and by the various states in the American Union.

Outside of the Balliet case, the main reliance of counsel for the accused, is on certain decisions of the Supreme Court of the State of Missouri, where the rule is entirely at variance with the general trend of American authority.

V.

THERE WAS NO ERROR IN THE REFUSAL OF THE TRIAL COURT TO GIVE THE INSTRUCTIONS REQUESTED ON THE SUBJECT OF LOLA NORRIS AND MARSHA WARRINGTON BEING ACCOMPLICES AND FOR THAT REASON VIEWING THEIR TESTIMONY WITH DISTRUST.

On pages 147 to 169 of their brief, counsel for the accused discuss the proposition that the trial court erred in refusing various instructions requested on the subject of accomplices. They claim that both Lola Norris and Marsha Warrington were accomplices of the accused.

**PROPOSED INSTRUCTIONS WERE INAPPLICABLE TO ANY
ISSUE IN THE CASE.**

It, of course, must be conceded by counsel representing the plaintiff in error that unless these proposed instructions were responsive to some phase of the controversy then being tried, the court was justified in refusing to give any of them to the jury.

Chicago v. Robbins, 17 Law Ed. 298; 2 Black 418;

Keyser v. Hitz, 133 U. S. 138;

N. Y. Syndicate v. Fraser, 130 U. S. 611.

It would follow, therefore, that if the record is destitute of any evidence upon which the jury, under appropriate instructions, would be justified in reaching the conclusion that either Lola Norris or Marsha Warrington was an accomplice, the action of the lower court in refusing to give to the jury the requested instructions was not only eminently proper but the only course which it had the legal right to pursue.

The position of the Government upon this question is that under no aspect of the case can it be successfully contended that under the evidence or the law, either Lola Norris or Marsha Warrington was, or can be held to be, an accomplice of F. Drew Caminetti.

Between the two covers of the record in this case there is neither a shred nor scintilla of evidence tending to establish that either of these two girls suggested departing from or wanted to leave the

State of California. The idea that they should desert the homes of their parents and accompany the two young men on their journey eastward or to some other place, found its origin in the fertile minds of Diggs and Caminetti.

Against the persuasions, entreaties and persistent demands of Diggs and Caminetti to leave their homes in Sacramento and go with them, they battled and fought and temporized until, coerced and frightened, they arrived at the conclusion that it was the only path to subsequent respectability and the only way of avoiding scandal that would endanger not only their names, but the reputations of their families.

The testimony shows that on the night before their departure,—being the night of the day upon which in the Peerless restaurant their long delayed consent to leave Sacramento was obtained,—and at a time when they were no longer within the influence of these contaminating forces which had been at work upon them for so many weeks, they finally made up their minds not to leave. And it was not until the next afternoon, when at the request of Diggs and Caminetti they again met Diggs in the public park, that against their own better judgment and desire they were persuaded that the only course to pursue was to flee.

Marsha Warrington was evidently the more susceptible of the two. Her then physical condition, brought about by Diggs, placed her in a position where she could no longer withstand or resist his

importunities and insistence. Is it then to be wondered that, frightened, intimidated and coerced as she was, she turned to Lola Norris and said:

“Lola, I am going and you have got to go, too” (Testimony of Caminetti, p. 407).

Of course it will be remembered that the exclamation above narrated is testified to only by the defendant, Caminetti. That it ever occurred is positively denied by both girls. Miss Warrington on redirect examination testified:

“I never advised Miss Norris to take this Reno trip. I told her she could do exactly as she pleased” (p. 278).

Upon this subject Miss Norris testified:

“Miss Warrington and I talked about it when we were alone several times and we both had our opinions upon the matter, but Miss Warrington never told me that I had to go or asked me to go or anything of that kind” (p. 300).

Can it be said that because Marsha Warrington under the circumstances already depicted, said to Lola Norris, “I am going and you have got to go, too”, that she thereby “knowingly, voluntarily and with common intent with F. Drew Caminetti and Maury I. Diggs, or either of them, united in the commission of the crime perpetrated by them”?

People v. Bolanger, 71 Cal. 20;

People v. Coffey, 161 Cal. 439-40;

Rice's Criminal Evidence, sec. 319;

Bishop's Criminal Procedure, sec. 1159.

This was the language of one victim to another, both of whom were about to be persuaded or coerced. This language of the accused was not effective to make of either or both of the girls accomplices in the contemplation of the White Slave Traffic Act. Especially must this be so in view of the recorded verdict that Caminetti was guilty only under the first count, which had nothing to do with inducing or persuading.

Upon a circumstance as shadowy and fragile as this would the learned judge of the court below have been justified in the exercise of a judicial or any discretion in advising the jury that if they believed that Marsha Warrington did make use of the language attributed to her, she would in law be converted into an accomplice?

That the answer to this inquiry must be in the negative is apparent, and such answer fully warranted the court and sustained its action in refusing to give to the jury any instructions upon the question of accomplice.

The definition of an accomplice negatives the idea that his activity in the commission of the offense charged was caused by force, fraud or undue influence. Where these elements exist, the conduct is no longer criminal.

As illustrative of this proposition, the case of

People v. Stratton, 141 Cal. 604-609,

is directly in point. That was a prosecution for incest. The defendant was accused of having had

sexual relations with his daughter. It was contended by him that as she consented to the act and participated therein, she was an accomplice, and therefore the conviction could not be upheld because it depended upon her uncorroborated evidence. In passing upon this question, the Supreme Court of this State, speaking through Mr. Justice Henshaw, said:

“If the prosecutrix, being of the legal age of consent, consents to the incestuous intercourse, unquestionably she is particeps criminis and her testimony, like that of any other accomplice, uncorroborated, is insufficient to uphold a conviction, but if, upon the other hand, she is *the victim of force or fraud or undue influence*, or is too young to be able to give legal assent, so that she does not *wilfully and willingly join in the incestuous act*, she cannot be regarded as an accomplice.”

In this case, the question as to whether the daughter was or was not an accomplice was left to the jury, because the evidence disclosed that she consented to the act, her contention being that it was through force. On the other hand, the evidence on behalf of the defendant tended to establish that no force of any kind had been used.

In *People v. Miller*, 66 Cal. 468, the same proposition was involved.

There it is said:

“In this case it is contended that the complaining witness, a boy thirteen years old, was an accomplice whose testimony requires corroboration; and as he was not corroborated the

conviction of the defendant was erroneous, but the uncontradicted testimony of the boy shows that he acted under the threats and coercion of the defendant. He was therefore not an accomplice; and as the evidence in the case was sufficient to sustain the verdict, the judgment and order must be affirmed."

A case very much in point is

Greenwood v. State, 105 Pac. 371-3.

There the plaintiff in error was convicted of feloniously advising and procuring Ethel Carpenter, a pregnant woman, to use certain instruments for the purpose of producing a miscarriage.

On appeal it was claimed that the sister of the deceased who was present at the time the abortion was subsequently performed by one other than defendant, was an accomplice. In holding otherwise, the court said:

"Her testimony is to the effect that the defendant arranged with Dr. Brewer to come to her residence and perform the operation and that when she learned of that she telephoned Dr. Brewer that he could not perform the operation at her residence and that she advised her sister against the operation, warning her of the danger attached, and urged the defendant to marry her sister, and that on her sister's urgent request she accompanied her to the doctor's office but never at any time consented to it. *In our opinion she is not to be adjudged an accomplice solely because, through sisterly affection, she went to the doctor's office, when the truth is she did not give her consent to it, but*

THE TRUE TEST OF AN ACCOMPLICE.

Neither Lola Norris nor Marsha Warrington was by any possible theory or construction of the White Slave Traffic Act an accomplice of Caminetti in the offense charged. As the victim of wrongful interstate carriage, neither could be jointly indicted with Caminetti.

In *1 Am. & Eng. Encyc. of Law and Practice*, page 550, we find the following definitions and tests of accomplices:

“The term ‘accomplice’ signifies in law a *guilty associate in crime*, and is strictly defined as one who is associated with others in *commission of a crime, all being guilty*. The general test by which to determine whether one is an accomplice is the inquiry: *Could such person be indicted and punished for the crime for which the accused is being tried? If he could be indicted and punished he is an accomplice, otherwise he is not.*”

In *1 Am. & Eng. Encyc. of Law*, page 390, we find the following:

“WHO IS AN ACCOMPLICE.—General Test.—The test in general to determine whether a witness is or is not an accomplice is the inquiry: *Could the witness himself have been indicted for the offense, either as principal or as accessory? If he could not be so indicted he is not an accomplice.*”

Holmgren v. United States, 156 Fed. 439, decided by the Circuit Court of Appeals, Ninth Circuit, October 14, 1907.

In that case Judge Gilbert thus refers to the rule:

(444) "It is assigned as error that the court failed to warn the jury of the danger in convicting a defendant on the testimony of an accomplice. This assignment is based upon the theory that Frank Werta, the applicant for citizenship, was an accomplice with the plaintiff in error, who made the false oath. An accomplice is 'one who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime'. *People v. Bolanger*, 71 Cal. 19, 11 Pac. 799; *State v. Roberts*, 15 Or. 197, 13 Pac. 896. To render one an accomplice, 'he must in some manner aid or assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the criminal transaction'. *People v. Smith*, 28 Hun. (N. Y.) 626. Mere knowledge on the part of a witness that the defendant purposes to commit a crime, or does commit a crime, does not render the witness an accomplice. There is nothing in the evidence in the bill of exceptions to show that Frank Werta was an accomplice within these generally accepted definitions. There is no evidence that he solicited the plaintiff in error to make the oath concerning his residence in the United States, or suggested the facts which were sworn to or assisted him in or incited him to the commission of the offense. On the other hand, the evidence conveys the impression that the affidavits as to the time of Werta's residence in the United States were furnished not at his own, but at the instigation of others. Under the circumstances, we think it would have been error to caution the jury on the theory that Werta's testimony was that of an accomplice."

This rule is also recognized by the very California case which constitutes the mainstay of counsel for the accused upon this proposition:

People v. Coffey, 161 Cal. 433.

The court will bear in mind in considering the Coffey case that it is a decision under the California statutes which forbid the conviction of an accused person on the uncorroborated testimony of an accomplice. Of course counsel for the accused in the case at bar recognizes that no such statute or rule prevails in federal courts.

In the course of his opinion, Mr. Justice Henshaw says:

(446) "Wherever the commission of a crime involves the co-operation of two or more people, the guilt of each will be determined by the *nature of that co-operation*. Whenever the co-operation of the parties is a corrupt co-operation, then always those agents are accomplices, even as at common law they were principals. *To the crime of seduction two parties are necessary, but the co-operation of the seduced is not criminal. She is a victim and she is not therefore an accomplice of the seducer.*"

So, in the case at bar, we say that both Lola Norris and Marsha Warrington were victims. They were not seducers. They were not guilty of offenses under the White Slave Traffic Act, because as victims they had been carried beyond the borders of their native state.

At page 448 of the same opinion, Justice Henshaw uses this language:

“This, then, is the true test and rule: If in any crime the participation of an individual has been criminally corrupt he is an accomplice. If it has not been criminally corrupt he is not an accomplice. *In those cases where the concurrent act or co-operation of two people is necessary, as in seduction, sometimes in abortion, and in the minor offenses of selling liquor, lottery tickets or harmful drugs, the relationship of accomplice does not exist because the co-operation of the other party is not denounced by the law as criminally corrupt, and, as a matter of fact, need not be criminally corrupt.*”

Could either Lola Norris or Marsha Warrington as the victim, willing or otherwise, of her interstate transportation at the hands of Caminetti, have been indicted jointly with him or otherwise, under the statute in question? Section 2 of that statute covers the only count of the indictment on which Caminetti was found guilty. It provides that any person who shall knowingly *transport or cause to be transported, or aid or assist in obtaining transportation for; or in transporting in interstate or foreign commerce, * * * of any woman or girl, or who shall knowingly procure or obtain or cause to be procured or obtained, * * * any ticket or tickets, or any form of transportation, or evidence * * * to be used by any woman or girl in interstate or foreign commerce, etc., shall be deemed guilty of a felony.*

There is nothing in this language to show that the person transported, the girl or woman whose transportation is directly procured or aided in, is

in any way amenable to the penalties denounced by the statute. The offense created is one on the part, *not of the woman or girl, but on the part of him or her who transports or aids in the transportation of such woman or girl.* Could any sane person contend that if Marsha Warrington or Lola Norris had with her unaided resources gone purposely to Nevada, unsolicited by Caminetti, to engage in unlawful cohabitation with him, she would have been indictable under this statute? We think not. She would not have been guilty of the criminal conduct denounced by the law. The offense denounced is the obtaining by another than the woman or the girl to be transported, of the transportation. Neither Marsha Warrington nor Lola Norris was an accomplice of Caminetti's in any offense committed by him under the White Slave Traffic Act.

ASSUMING THE GIRLS TO BE ACCOMPLICES, THE REFUSAL TO GIVE THE REQUESTED INSTRUCTIONS CONSTITUTED NO ERROR BECAUSE OF THE ACQUITTAL OF CAMINETTI ON THE LAST THREE COUNTS.

In the first count contained in the indictment the defendant was charged with having unlawfully transported and caused to be transported and in having aided and assisted in obtaining transportation for and in transporting in interstate commerce, Lola Norris, for the purpose of having her become his concubine and mistress. Upon this count alone defendant was convicted.

In the second count of the indictment he was charged with the same offense, Marsha Warrington being substituted for Lola Norris, the intention alleged being that she should become the concubine and mistress of Maury I. Diggs.

In the third count he was charged with unlawfully *persuading, inducing and enticing and assisting in persuading, inducing and enticing*, Lola Norris, to go from Sacramento to Reno, for the purpose of becoming his concubine and mistress.

In the fourth count he was charged with the same offense as to Marsha Warrington, she to become the concubine and mistress of Diggs.

Upon these last three counts the defendant was acquitted.

In view of this situation, any error that may have been committed by the court in the admission or rejection of evidence or in failing to give proposed instructions to the jury relating to any of the offenses charged in the last three counts of the indictment, was without prejudice to plaintiff in error and cannot be made the foundation for a reversal of the judgment of the lower court which is based exclusively upon the finding of the jury that the defendant was guilty of transporting and assisting in the transportation of Lola Norris from Sacramento to Reno.

The offenses denounced by the statute in its several sections are distinct.

The second section denounces the actual transportation or aid in such transportation, and the later sections denounce the persuading, inducing, enticing or coercing of the woman or girl, the victim of the transportation.

This distinction was clearly pointed out by Judge Van Fleet in his charge, where he said:

“You will observe that the statute is very comprehensive in its language. It covers several different acts, each one of which is made a criminal offense under its provisions; those here involved being, first, the transporting or aiding in the transportation in interstate commerce of a woman or girl for such immoral purpose or with the intent to induce, entice or compel her to give herself up to such immoral purpose; and, second, the persuading, inducing or enticing any such woman or girl to be so transported in interstate commerce for such immoral purpose. These different acts constitute separate offenses under the statute. Under the first it is an offense to transport or aid in the transportation of such woman or girl for the purpose denounced, whether she goes of her own volition or is induced to go by the means stated in the statute, and whether she is to commit the immoral acts specified with the person so transporting her or with some other person or persons; and under the second phase of the statute above outlined it is an offense to persuade, induce or entice such female to be so carried or transported for such immoral purpose whether the act of immorality is to be committed with the person so persuading, inducing or enticing her or with another or others.” (p.)

The language of Caminetti, quoted by counsel, can have no possible reference to the offenses charged against him under section 2. Its widest possible construction would be that Marsha Warrington aided him in persuading, enticing or inducing Lola Norris. Of course, both girls, as shown by the very following page of the brief of counsel, deny the language attributed to Marsha Warrington by the accused. While, as we have already argued, under the circumstances of the record it would have been grievous error for the trial judge to have given any of the instructions quoted by counsel at the pages of their brief above referred to, yet, even if the instructions were correct, the refusal to give them did Caminetti no possible harm. As already suggested he was found not guilty of *persuading, inducing or enticing* either Lola Norris or Marsha Warrington to engage in the unlawful transportation. There having been no such crime committed by him, he had no accomplice in that regard in either of the girls.

**EVEN THOUGH MARSHA WARRINGTON WERE AN ACCOMPLICE,
THE PROPOSED HYPOTHETICAL INSTRUCTIONS WERE
ERRONEOUS.**

Notwithstanding the argument advanced by plaintiff in error in this branch of his brief, in the last analysis it must be admitted that there is no evidence in the case upon which it can be asserted that Lola Norris was an accomplice. As has already been

shown, she could not have been an accomplice in her own transportation, and nowhere has it been claimed that she persuaded, induced or enticed Marsha Warrington to participate in the journey which ended in disaster to all.

If therefore the proposed hypothetical instructions impute to Lola Norris the capacity of an accomplice, or because of the language in which they are couched, would lead the jury to assume or to conclude that under the evidence she might be held to be an accomplice, such proposed instructions were properly rejected and the action of the lower court in refusing to give them to the jury cannot be held to be error.

At page 149 of the brief filed by plaintiff in error an instruction numbered 34 is shown. It is in part:

“I instruct you as to the witness Lola Norris, if you believe her testimony, that she is an accomplice of the defendant, and in this connection I further instruct you that while it is permissible in the federal courts to convict upon the uncorroborated testimony of an accomplice, still I further instruct you that before convicting the defendant on the uncorroborated testimony of an accomplice, you should view their testimony with great care and caution.”

This instruction, for the reasons already given, is clearly not sound law.

At page 149 of their brief, counsel set out instruction No. 35 in this language:

“You are further instructed that the testimony of accomplices, if you should believe

and be satisfied beyond all reasonable doubt and to a moral certainty that Marsha Warrington and Lola Norris, or either of them, were the accomplices of the defendant, should be received with caution and weighed and scrutinized with great care by the jury, &c.”

That instruction would have been erroneous, if for no other reason than that it would have misled the jury into the belief that by some possibility they could find under the testimony that Lola Norris was an accomplice of the accused, Caminetti.

The same objection would apply to instruction No. 101, shown on page 150, in this language:

“You are hereby instructed that the testimony of one accomplice cannot be accepted as sufficient corroboration of the testimony of another accomplice.”

As shown by the testimony there was neither one accomplice nor two. At all events, there were not two.

Instruction No. 102, shown also on page 150, contains the following language:

“You are hereby instructed that if you believe the testimony of Marsha Warrington and Lola Norris, or of Marsha Warrington or Lola Norris, then they are both accomplices with the defendant, &c.”

The instruction as worded would have been absolute error. Neither one nor both of the victims were accomplices of the conspirators who were aiding in their unlawful transportation.

The instructions numbered 32 and 33, shown at pages 148 and 149 of counsel's brief, were statements of abstract propositions of law which had no legitimate bearing on the pending investigation to be made by the trial jury, and they were misleading for the reason that they invited the jurors to believe that both girls were possible accomplices of Caminetti and participants in his crime, in effecting or in aiding in effecting their own transportation for immoral purposes, in interstate commerce.

IF THE GIRLS WERE ACCOMPLICES, REFUSAL TO GIVE WARNING INSTRUCTION CONSTITUTED NO ERROR.

Furthermore, if both girls were in very fact accomplices, the refusal of warning instruction upon the subject was not error. Failure to give could not in any event constitute prejudicial or reversible error.

The case in no aspect was that of a conviction secured or sought on the uncorroborated testimony of an accomplice. Besides, if it were, there is no federal statute or rule of law which precludes such conviction. The jury in any event, under the federal procedure, if they believed the accomplices' testimony, could convict, and in this connection we invite attention to *12 Cyc.* 453:

“In the absence of a statute, the credibility of an accomplice is for the jury, as is the case with all evidence. No common law rule forbids a conviction upon the uncorroborated

testimony of an accomplice, if his evidence satisfies the jury of the guilt of the accused beyond a reasonable doubt. Hence, although the uncorroborated testimony of an accomplice should be received and considered by the jury with caution, and the court should, and usually does, instruct them to that effect, *they may, in the absence of a statutory provision to the contrary, convict upon the evidence of an accomplice alone, although uncorroborated.*”

In many jurisdictions, however, statutes expressly provide that no conviction shall be had upon the testimony of an accomplice, unless it is corroborated in some material part by the other evidence tending to connect defendant with the commission of the offense.

The very language quoted by counsel at page 162 of their brief, shows that the giving of such warning instruction is *in the discretion* of the trial judge. They quote from Sec. 380 of *Greenleaf on Evidence*, 6th Ed., as follows:

“But on the other hand *judges in their discretion*, will advise the jury not to convict of a felony, &c.”

The rule on this subject is referred to in

Steinham v. United States, 2 Paine, 168;
Fed. Cas. No. 13,355,

as follows:

“The bill of exceptions states, that the court delivered its opinion to the jury, that they might *give a verdict for the plaintiffs, on the unsupported and uncorroborated evidence of an accomplice, if they believed he swore the*

truth. But the witness in this case was not an accomplice; he had no interest whatever in the goods, from anything that appears, or any knowledge that the defendant intended to evade the law. It was an opinion, therefore, given by the court, upon an abstract question, not applicable to the case, and if erroneous, would be no ground for reversing the judgment. But there was no error in the opinion on this point, had it been called for by the case. There can be no question but an accomplice is a competent witness. It is laid down in the books as a universal rule, that both in civil and in criminal cases, a *particeps criminis* may be examined as a witness, notwithstanding the immorality or the illegality of his conduct, provided he has not been convicted of any crime that incapacitates him. The objection, therefore, *resolves itself entirely into a question of credibility, and this is exclusively a question for the jury*, and comes within the rule laid down by the court. It may be proper, in many cases, for the court to caution a jury against convicting upon the uncorroborated evidence of an accomplice; but if he is both competent and credible, it would involve an absurdity to say his testimony was not sufficient to establish a fact. The rule, however, I consider well settled as authority, and the fitness and propriety of it on principle need not be urged. Starkie, *Ev.* pt. 4, pp. 17, 23; 2 Camp. N. P. 133. The judgment of the district court must, accordingly, be affirmed with costs."

The reason for the rule here invoked is further emphasized when we come to consider the charge given by the learned judge of the court below to the jury. In the argument made on behalf of the plaintiff in error the concession is made that in the

federal court a defendant can be convicted upon the uncorroborated testimony of an accomplice, if such evidence satisfies the jury of the defendant's guilt.

That such is the law applicable to prosecutions in federal courts is unquestioned.

Hanley v. U. S., 123 Fed. 851;

Richardson v. U. S., 181 Fed. 109;

Wong Din v. U. S., 135 Fed. 702.

If it is assumed that Marsha Warrington was an accomplice, yet it cannot be urged that her testimony was not corroborated. In all of its details, in so far as it relates to the particular offense of which plaintiff in error was convicted, it is elaborately sustained by independent proof, upon the truth of which no attack has been or can be made. The defendant himself, who testified as a witness on his own behalf, failed to contradict that portion of her evidence touching this subject, or even make any explanation concerning it.

We are therefore not dealing with a case in which a conviction was procured upon the uncorroborated testimony of an accomplice, or in which a conviction obtained is sought to be sustained only because of such evidence.

In its charge to the jury, the lower court explicitly, elaborately, fully and fairly instructed the jury as to the various rules governing the weighing of evidence and not only informed them of the presumption of innocence by which the defendant was clothed, but repeatedly told them that before they

could convict, they would have to be satisfied of his guilt beyond a reasonable doubt and to a moral certainty.

An instance of this is found in the following language:

“* * * The law, in its charity, presumes the innocence of a defendant, and that presumption abides with him throughout the trial and until his guilt is established by the evidence. The showing of a mere probability of guilt is not sufficient. Before a conviction may be had it is incumbent upon the Government to prove the guilt of a defendant by evidence which, as I have heretofore stated, satisfies the minds of the jury beyond a reasonable doubt, and *that means by evidence which satisfies their minds to a moral certainty, and which accords with their reason and judgment to an extent which would induce them to act in the important affairs of life.* * * *” (supra, p. 32.)

When there is taken into consideration the entire charge of the lower court relating to this branch of the controversy, the inevitable conclusion is reached that no advantage of any kind would have been gained by defendant had the court specifically informed the jury that it was its duty to exercise care and caution in scrutinizing the testimony of Marsha Warrington, in the event they believed her to be an accomplice.

While we have presented this question in its every aspect nevertheless we insist that from no viewpoint can either of the unfortunate victims of

the rapacity of plaintiff in error and his confederate, be held to be an accomplice.

VI.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING TO INSTRUCT THE JURY TO ACQUIT DEFENDANT AND DENYING HIS MOTION IN ARREST OF JUDGMENT.

At pages 170 to 206 of their brief, counsel for plaintiff in error in Subdivision V, discuss the proposition thus stated.

“The court erred in refusing to instruct the jury to acquit and in refusing to grant the motion in arrest of judgment, upon the ground that there was no evidence sufficient to justify submitting the case to the jury or to sustain the judgment of conviction.”

Caminetti's counsel insist that the record disclosed no evidence that he transported or aided or assisted in the transportation of Lola Norris in interstate commerce. They also in apparent sincerity assert that the evidence failed to show any intent to violate the law under which the indictment was framed.

We shall not follow counsel through the many pages of this subdivision of their argument. In our outline of the facts above given we have indicated somewhat fully how in the various efforts of Caminetti and Diggs to possess themselves thoroughly of the persons of these two young girls, each of about the age of twenty years, and to lure them from their

homes in which they wished to remain, Caminetti was as constant, if not as brainfully efficient a factor, as his older partner in crime. In fact it was through Caminetti that the party of four was originally organized. In this connection it would be well to call attention to the testimony of Marsha Warrington shown at pages 256-7:

“The next time I met Mr. Diggs was in the latter part of October. He phoned to me and wanted me to go out with him but I told him no, that I wouldn’t go, and so finally he said that he wanted to prove what a gentleman he was, though his reputation around town might not be the best in the world, and he wanted to prove he was a gentleman and wanted to know if I wouldn’t take a little ride with him and give him this opportunity. And so then I told him no, that I wouldn’t go, and then he phoned to Miss Norris, or rather he found out from Mr. Caminetti that he was acquainted with Miss Norris, and he phoned to her and asked her if she would not go out for a little ride, and finally after telephoning around from one person to another, they finally agreed to go for a short ride. This was the latter part of October. We went for a ride.”

That ride was the occasion of the organization of the party of four which from that night forward went at such a furious pace.

This testimony of Marsha Warrington is directly in line with that of Lola Norris on the same point, shown at pages 285-6 of the record:

“I know Maury I. Diggs. I first became acquainted with him the last part of October of last year. That was the occasion I first went

out with Mr. Caminetti. Mr. Caminetti rang me up on the phone one evening and asked me if I would introduce him to Miss Warrington. He said that Mr. Diggs was anxious to meet her and *he would like to make the two of them acquainted.* At that time I had heard of Mr. Diggs but I had never seen him. I said I would introduce him to Miss Warrington. I think the appointment at that time was made. * * * In any event, the four of us did meet."

From that very night the members of that party were intimately associated in their wild career of illicit pleasure. Henceforward they constituted one party of four members.

It is not necessary here to repeat the nauseating incidents that marked the career of that party from that meeting night in October, 1912, down to their discovery by Chief of Police Hillhouse of Reno in the defiled bungalow in that town.

Through all the two weeks of argument made by Diggs and Caminetti alike to induce these two girls to leave the State with them, Caminetti was active in advice, entreaty, persuasion, and in the seeking and securing of money with which to finance the trip.

Their conduct, their acts, their declarations, their conferences and conversations, all show beyond the shadow of a doubt that in every step that was taken Caminetti and Diggs were acting together as confederates, proceeding upon a mutual understanding, both seeking to accomplish the same common purpose, the taking away of the two girls for the

purpose of having illicit relations with them. The evidence is so clear, convincing and satisfying upon this subject that we are at a loss to comprehend how counsel for plaintiff in error can seriously argue the insufficiency of the evidence upon this point.

CAMINETTI THE ARCH CONSPIRATOR.

Upon this subject Marsha Warrington testified as follows:

(229) "The meetings occurred with more frequency during the latter part of the period than the early part. During the earlier part of the period, perhaps once a week, or maybe twice a week, or maybe three or four times; during the latter part of this period we went out very frequently and met very frequently.

Mr. Caminetti called at my house. Mr. Diggs never called at my home. Miss Norris was attending night school during the month or six weeks preceding the 10th of March, 1913. During the three or four or five weeks before I left upon the Reno trip the four of us would meet four or five times a week. Mr. Caminetti would get me at my house. We would then meet Mr. Diggs. Then Mr. Caminetti would either go with us or would leave us and then meet Miss Norris at night school at nine o'clock, and the four of us would meet afterwards. On the other occasions when Miss Norris did not attend school I would meet her at her home. Mr. Caminetti and I would go after her at her home. Mr. Caminetti was known at my home by the name of Mr. Whitman."

Upon this same subject, Lola Norris testified:

(286) "Between that time (the first meeting of the four) and the early part of March, 1913, the four of us went out about three or four times a week. *Mr. Caminetti would come to my home after me in the name of Whitman.* Mr. Diggs came into my house once. I do not think my father was there at that time. *Outside of that one occasion Mr. Caminetti would get me.* During the time I was attending the night school three times a week, upon those nights I met the other three parties. Mr. Caminetti generally met me and sometimes Mr. Diggs and Miss Warrington were with him. *Either the three of them met me or Mr. Caminetti alone.*"

The activities of Caminetti in this regard are also shown by the testimony of the parents of the two girls.

T. H. Warrington, father of Marsha Warrington, gave the following evidence:

(232-3) "I never had met the defendant in this case under the name of F. Drew Caminetti. I knew a man by the name of Whitman. Prior to the month of March, 1913, I had known this man who went under the name of Whitman possibly four to six weeks. I first met him in my house. He called there for my daughter, Marsha Warrington. He was introduced to me by my daughter under the name of Whitman. He stated that he was employed by M. E. Winchell & Cline. That is a jobbing and retail firm in Sacramento. He gave me to understand that he was soliciting for them. He called, I should say, probably fifteen times at my house for my daughter between the time I first came in contact with him and the 10th day of March, 1913."

W. E. Norris, the father of Lola Norris, testified:

"I do not know the defendant in this case, F. Drew Caminetti, under that name. I met him twice at the house. He was introduced to me as Mr. Whitman. * * * Shortly after that he came one evening to take Lola, as I understood it, to the theatre, and while waiting for her to get ready I invited him inside and we sat down and chatted a few moments. * * * I think he must have called quite a number of times upon other occasions. I never met Maury l. Diggs in my house. I never saw him there."

It will thus be seen that even during the early stages of the association of these four parties, Caminetti was unduly zealous even to the extent of invading the young ladies' homes under an assumed name to aid in the accomplishment of their ruin.

In the more advanced stages of the association of these parties, the same activity on the part of Caminetti is observed. Concerning the time that their departure from Sacramento was first discussed, Marsha Warrington says:

(87-88) "Leaving Sacramento was first discussed among the four of us about three weeks previous to taking this trip to Reno. The first time, I think, we were riding in Mr. Diggs' machine when it was discussed. It was Sunday; during the afternoon, Mr. Diggs phoned to Miss Norris' home. I was there spending the afternoon with her; he phoned and said he had something very important to tell us and he wanted us to see him that afternoon; we said it was impossible as Miss Norris' mother was ill, so he said he would like to see us that night, if possible, and so, I think I saw him that night. I am not sure whether I did or Miss

Norris did, but it was one of us. *Mr. Caminetti was right there with Mr. Diggs at the telephone. I think he talked to Miss Norris.* * * * Myself and Miss Norris said it was absolutely out of the question and we would not go."

That Caminetti participated in this telephonic communication and talked to Miss Norris is also shown by the evidence of Miss Norris, she stating:

(292) "That discussion took place over the telephone. Mr. Diggs called us up over the telephone and discussed it. Mr. Caminetti was with him and talked also. *Mr. Caminetti also telephoned at the same time.* * * * Then Mr. Caminetti came to the phone and talked and they both said there was something we ought to know and we should come out with them no matter what would happen, that we should come out and hear what they had to tell us because it was to our advantage to know what it was, and Mr. Diggs said, I think, I am going to leave town, and I said, oh, are you, and he said yes, and he said that he and Mr. Caminetti were going to leave Sacramento and he said 'You and Marsha had better come with us'."

CAMINETTI A CONSTANT CONFEDERATE.

The following Monday night Miss Norris met Caminetti and subsequently the two of them met Diggs and his uncle. During the conversation between Miss Norris, Caminetti and Diggs, Diggs told her that he had been in hiding in the Columbia Hotel and that it was absolutely necessary that he leave town, and wanted Miss Norris and Miss Warrington to go with him and Caminetti. In these

statements Diggs was corroborated by Caminetti, who said:

(293) *"Mr. Caminetti said that that was right; that everything that Mr. Diggs said was true and that it was necessary that we should go. * * ** During that entire hour we were discussing going away. Miss Warrington was not there that night. When I told Mr. Caminetti that I would not go away, he said 'Well, I have to go away'. He said that if Mr. Diggs went he would go with him."

And as illustrating the character of persuasion, entreaty and intimidation that was used by these two parties during this conversation, Miss Norris testified:

(294) *"Mr. Diggs and Mr. Caminetti both said that the police would keep us pretty busy after they left trying to find out where they had gone to and that they would make us tell every place we had ever gone with them and they would put us through the third degree and put us in a reform school."*

The same character of threats were made to Miss Warrington and to both of the girls when together.

Upon this subject Miss Warrington testified:

(243) *"Mr. Diggs said there were warrants out for our arrest; that he had heard that the juvenile authorities were after us and would have us sent to a reform school or put under their jurisdiction, and he said that their wives would sue us. Mr. Caminetti said that he had seen a policeman and he then told him it was all over town and mentioned our names. He said we had better get out of town and he said*

*there was nothing to do but to get out and he and Mr. Diggs said we had to go. * * * These conversations took place during the last two weeks every time we met, about five or six times I should judge. * * * They said that we had to go with them. We said it was absolutely out of the question. We would not go. Mr. Caminetti was present at all of these conferences. He participated in them."*

The falsity of the statements made by the two girls is shown by the testimony of M. J. Sullivan (238-242) and John S. Chambers (235-238).

As further showing the co-operation and common understanding existing between these parties between the date of the first meeting and the time that the Reno trip was taken, we find them meeting together, riding together, traveling together and visiting Diggs' offices together,—in fact the only separation shown was that created by the partition existing between two of Diggs' offices and the walls separating the rooms occupied by them on their trip to San Francisco and San Jose.

Another incident which throws some light upon the participation of Caminetti was the meeting of the four at the Columbia Hotel in Sacramento. It seems that Diggs had been in hiding in the hotel for some few days. He telephoned to Marsha Warrington requesting her and Miss Norris to come there, stating that he and Caminetti had something important to communicate to them. *Caminetti* rang Miss Norris up and made an appointment with her to accompany Miss Warrington to the hotel. On

the way to the hotel they met Caminetti, who did not go with them because according to his explanation he was afraid he was being followed by an officer, but stated that he would meet them there later. He subsequently joined them. Testifying to what occurred at this meeting, Miss Warrington said:

(244-5) "Mr. Caminetti told about having met this detective and what he told him. The detective said he had heard that it was all over town that Mr. Caminetti and Mr. Diggs were going with us, and that their wives had our names and that he had better take his advice and get out of town. There was no other subject discussed during that half hour. *They told us we had to go with them and that they would marry us when we left Sacramento, and that after they had heard all of these things they did not think there was anything else for us to do.* * * * At the time we left the Columbia Hotel we still refused to go. We said we could not leave our parents. They said they would hear about it anyway if we stayed in town and so we might as well go away. *Both Mr. Diggs and Mr. Caminetti made that suggestion.*"

What transpired at this meeting is likewise fully testified to by Miss Norris (Record 296-8).

On the Saturday preceding the date of their departure for Reno, the four again met at the Peerless Restaurant, Diggs making the appointment with Miss Warrington, and Caminetti with Miss Norris. As between the two men the place of meeting had evidently been agreed upon. They there remained in session for three hours and a half, the

entire time being occupied in endeavoring to overcome the objections of the two girls to leaving their homes and in persuading them to accompany them. As to this Miss Warrington testified:

(246) "They said that it was absolutely necessary that we go away; that it was the only thing to do and that we had to leave Sacramento. We both told them that we could not go; that it would kill our parents if we left Sacramento, and *they* said, well, they would get over it, or something to that effect. They brought up all these things again—all these things about the police. Before leaving the restaurant at 5:30 we said we would go."

According to Miss Norris, during this conversation Mr. Caminetti said:

(298-9) "Their wives would sue us for alienating their husbands' affections, and would begin actions for divorces and would name Miss Warrington and me as co-respondents. Mr. Diggs said the punishment for this was a term of imprisonment for Miss Warrington and me.

* * * I said I had often seen in the papers about women being named co-respondents in divorce cases and that they were not always prosecuted so vigorously, and he said it was either a case of a person having a great deal of money and being able to buy off the complaining person or that probably they were of no importance and the affair was given no notoriety, but owing to the fact that we all were connected with such prominent families in Sacramento they would make a lot of talk out of this and it would be a great scandal. *Mr. Caminetti said he knew Mr. Diggs was telling the truth when he said his father was coming up; and he also said he wouldn't be at all surprised if Mr. Diggs' father put him in*

prison and he could be made to serve a term in prison for going to my house under an alias, but that he would not leave town unless I went with him. He couldn't leave me to bear the disgrace alone. Then they said—they said their wives would start actions for divorce just as soon as they found their husbands had gone and Mr. Caminetti said that if his wife did not, he would get a divorce within a certain length of time if his wife had not taken any action. Mr. Caminetti said we would be married after these divorces were granted."

At the Sunday afternoon conference held between Diggs, Miss Warrington and Miss Norris, at the park in Sacramento, Diggs, in the course of his argument to persuade the girls to go, said:

(301) *"That Mr. Caminetti was at the present time getting some money to finance the trip, that he and Mr. Caminetti had an agreement between them to meet Miss Warrington that night and that we were to leave that night."*

After parting from Diggs at the park on that Sunday afternoon, the parties met by appointment at the Saddle Rock restaurant. Speaking of the meeting, Miss Norris testified:

(302) *"Mr. Diggs told us that afternoon to meet at the Saddle Rock restaurant. When we reached the Saddle Rock restaurant, Mr. Diggs and Mr. Caminetti were there. They were in a box. The four of us remained together about half an hour before any member of the party separated. * * ** (303) *When we agreed on Reno, just before Mr. Caminetti left, he gave me twenty dollars. I don't know whether he wanted me to buy my own or buy my own and Miss Warrington's together. Immediately after*

that Mr. Diggs said that he would buy the tickets. He said that if Miss Warrington and I went separately to buy our tickets it would be sure to cause some suspicion, and he said we would be much more likely to carry the affair through successfully if we would go all together. He said some one ought to manage the party; that if each one wanted to follow his own inclination we would never make any headway at all. *He said some one would have to manage the party and the others would have to abide by his decisions. And so Mr. Caminetti said: 'I will make you the boss', and so Mr. Diggs took charge of the party. Mr. Caminetti and Mr. Diggs were to share the expenses. After that Mr. Caminetti left."*

On Caminetti's return from the search for money with which to finance the trip, Miss Norris testifies:

(304) *"He said he had been having quite a time trying to locate the party who was to give him the money but he finally succeeded in finding him and he secured the money and we all went down to the depot again. We reached the depot about fifteen minutes before the train left, I think. Mr. Diggs went to the ticket office and bought the tickets."*

After Caminetti's departure from the Saddle Rock restaurant, the parties went to the station at Sacramento, but not meeting him, returned to the restaurant. Speaking of this circumstance, Miss Warrington testified:

(249) *"After returning to the Saddle Rock restaurant and remaining there a short while we went back to the depot and met Mr. Caminetti there. That was just before the train came in that we took. The Saddle Rock res-*

taurant is about two blocks from the depot. *After meeting Mr. Caminetti at the depot Mr. Diggs said that he would go and buy the tickets; so he said for us to stand back at the side of the building there so we could not be seen, while he went to buy the tickets and to wait there for him. Mr. Caminetti just stood there with us. * * * I heard no objection made by Caminetti to the suggestion of Mr. Diggs that he purchase the tickets."*

The automobile trip to San Francisco on which the girls were persuaded by the agreement on the part of Diggs and Caminetti that in San Francisco the two girls would be permitted to occupy a room together and would not be molested by the men is also persuasive evidence of the collusion and confederation existing between them and the concerted action taken thereon (see testimony of Marsha Warrington, transcript, 269-271; testimony of Lola Norris, transcript, 288-291).

This court has a right to take into consideration, as did the jury, the events transpiring after the parties located themselves upon the train on their journey to Reno, and before they were taken into custody.

From these subsequent developments alone, the jury would have been justified in arriving at the conclusion that the parties were acting together under a common understanding. We see Caminetti sitting silently by while Diggs procured and paid for the drawing-room, shortly thereafter occupied by the four. We notice that no objection of any

kind was made by Caminetti to its being used nor to the fact that one berth was to be occupied by himself and Miss Norris. After reaching Reno, after having agreed between themselves upon false names to be assumed by them, we find them together visiting a real estate office for the purpose of renting a bungalow; together registering at the Riverside Hotel; together again paying a visit to the real estate office to pay the first month's rent for the bungalow which had been rented and agreeing that the receipt should be taken in the name of Enwright (Diggs).

We also find Caminetti giving orders and paying for groceries and requesting the grocery clerk to call for subsequent orders which would be given to him by his wife, and finally we have them living together in the bungalow as husbands and wives ordinarily reside together.

That the bungalow was rented by both of them was made clear from the evidence of T. J. Peck, who testified:

(186-7) "I first met him (referring to the defendant, Caminetti) in my office on the 10th of March last at about nine or ten o'clock in the morning, I think, or about that time. He was accompanied at that time by a man who gave his name as Enwright. *They* were inquiring for a cottage,—a house to rent. * * * *They* stated that they wanted to rent a cottage which *they* said they wanted to occupy for several months. * * * *It was finally rented by these two individuals.* It was rented at \$35 a month. There was some rent paid; the first

month's rent, \$35, was paid. They did not specify the exact number of months they desired to rent the cottage for. * * * They said something as to whether they were married; *they spoke of their wives. I think each of them spoke of their wives.* * * *."

This witness further testified:

(199) "There was a point which occurs to my mind which rather fixes the point that the defendant and the man known as Enwright were present at the time the rent for this cottage was paid and that is at the time the rent was paid I asked to whom I should make the receipt. I addressed myself to both of them and I believe they both agreed that it should be made to Mr. Enwright."

On cross-examination, page 200, this witness further said:

"I am positive they were both there at the time I made that receipt out, because I asked who shall I make this receipt out to, whether to one party or both of them, and one of them said it didn't make any difference 'You can make the receipt to Mr. Enwright'."

With reference to the ordering of the groceries, the witness F. M. Miller, page 194, testified:

"I first came in contact with either of these two men, the man known as Ross (Caminetti) and the other man admitted to be Maury I. Diggs, when I delivered a load of groceries to 235 Cheney Street. * * *

Q. By whom were the goods ordered, if you know?

A. By Mr. Ross.

Q. On how many occasions were goods ordered?

A. Probably three or four times.

* * * * *

At the time I obtained the orders at the grocery store, the order was given Mr. Ross, I think. Mr. Ross paid for the first order I took over there. I think the ladies paid for one or two. The other individual, whom it is admitted is Maury I. Diggs, did not pay for any of the groceries to my knowledge. * * *

Q. Did the man who you knew as Mr. Ross, the defendant in this case, say anything to you concerning the ladies located at the cottage?

A. He asked me to call and take orders after the first order I had taken there. There was no phone in the house. He said his wife would order what they needed."

In view of the testimony just above specially noted and the other testimony in the record, the trial judge thus charged the jury on this subject:

"As to the question which has been argued by counsel whether the evidence is sufficient to show that the defendant transported or aided or assisted in transporting these girls to Reno, you will understand that it is not necessary to sustain this charge that the defendant be shown to have himself paid for the tickets or other expenses of that trip. *If he contributed to the means of paying such expenses or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs, this would be sufficient on which to sustain the charge that the defendant aided and assisted in such transportation.*"

In presenting their argument in support of this point, it is insisted that the lower court committed error in permitting the witnesses to testify to the acts, conduct and declaration of Diggs, it being

complained that the prosecution was not one for conspiracy, and that, therefore, nothing said or done by Diggs would be binding upon Caminetti. No authorities are cited in support of this argument and none entitled to serious consideration can be found.

**PRECONCEIVED CONCERTED ACTION ASSERTED AND
ESTABLISHED.**

It was made apparent to the trial court, and it is manifest from the record already quoted, that the case was not being tried upon the theory that there was no connection between Diggs and Caminetti.

From the inception of the trial until its close, the Government persistently and insistently urged that the flight to Reno was the result of the preconceived and concerted action of both Diggs and Caminetti, striving together at all times towards achieving the common purpose, which was subsequently accomplished, that these girls should accompany them out of the state and live with them in illicit intercourse. If the evidence introduced was compatible with this claim, and indeed it is at variance with any other theory, then the testimony objected to was clearly admissible even though no conspiracy was alleged in the indictment.

That this was the prevailing idea in the mind of the court is shown by the language used in

passing upon some of the objections, the court saying:

“The COURT. The objection is overruled. The evidence tends to show, Mr. Woodworth, that this was a transaction in which four people were engaged,—the defendant and another man and the two girls; of course, under such circumstances, the declaration of any one of them made in the presence of the other may be permitted to go before the jury, all the circumstances being shown, and the jury will determine whether or not what was said affects the others, by ascertaining whether any denial of the circumstances was made, and the other circumstances which would tend to show whether the declaration of the one was intended to apply to the understanding of the others as to what the transaction involved. In such a case it is very much like a prosecution for conspiracy, only here, of course, it is admitted simply because and only because it is made in the presence of the defendant—made either by or in the presence of the defendant * * * ” (p. 217).

And again, in passing upon another objection, the court said:

“The COURT. * * * The evidence of the Government tends to show that it was a transaction that really was united in by these four different people—that is, I mean the history of the transaction out of which the offense is charged, and I am inclined to think that in such an instance, very similar to the rules showing conspiracy, that you may show all the circumstances” (pp. 252-3).

And that the court was but following well recognized legal principles, frequently declared and consistently adhered to, can be gathered from the numerous decisions of federal and state tribunals.

It is axiomatic that where it is claimed that crime has been committed as the result of concerted action or a preconceived design on the part of several, the acts, declarations and conduct of all in furtherance of the common purpose, are admissible in evidence upon the trial of one of the parties charged with the commission of the crime, even though no conspiracy or crime is alleged in the indictment and even though the defendant is not present at the time the declarations are made or acts committed.

St. Clair v. U. S., 154 U. S. 134; 38 L. Ed. 936-943.

“Exceptions were taken at different stages of the trial, to the admission against the objection of the accused, of evidence as to the acts, appearances and declarations of Sporf and Hanson. *These exceptions seemed to rest upon the general ground that the indictment did not charge St. Clair, Sporf and Hanson as co-conspirators. The evidence was not, for that reason, to be rejected.* St. Clair, Sporf and Hanson were charged jointly with having killed and murdered Fitzgerald. The acts, appearances and declarations of either, if part of the *res gestae*, were admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time the alleged murder was committed. Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence.

'These surrounding circumstances constituting part of the *res gestae*' Greenleaf says, 'may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.' (1 Greenleaf on Evidence, 12th Ed. sec. 108; see also, 1 Bishop Criminal Proc., Secs. 1083-6.) 'The *res gestae*' Wharton said, 'may be always defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone, as well as things done. *Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or emanations of such act, and are not produced by the calculating policy of the actors.* In other words, they may stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act'."

Wiborg v. U. S., 163 U. S. 556; 41 L. Ed. 298.

"There was other evidence of declarations of members of the party as to their purposes,

and the district judge in commenting thereon said that, '*if these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition*' and to this rule an exception was taken. The general rule was stated in *Sundry Goods, Wares and Merchandise v. United States*, 27 U. S. 2 Pet. 358, 365, by Mr. Justice Washington, speaking for the court, that 'where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestae*, may be given in evidence against the others.' The declarations must be made in furtherance of the common object, or must constitute a part of the *res gestae* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the *Horsa* had been proved, then, on the question whether such combination was lawful or not, the motive and intention, declarations of those engaged in it, explanatory of acts done in furtherance of its object, came within the general rule and were competent.'" (Citing *St. Clair v. U. S.*, *supra*; *People vs. Davis*, 56 N. Y. 102; *Lincoln vs. Claflin*, 74 U. S. 7 Wall. 132; 1 *Greenleaf on Evidence*, Sec. 111; *Starkie Evidence*, 466.)

In

People v. Lane, 101 Cal. 517,

it is said:

"The evidence of acts and declarations of Dynelly was competent and material. *There was evidence tending to show joint preparations on the part of the defendant and Dynelly to kill Foulk.* The two men on the picnic grounds, prior to the shooting, had approached

the deceased together with revolvers drawn. Proof of a conspiracy, like any other fact, may be accomplished by circumstantial evidence. Our attention has not been called to any act or declaration on the part of Dynelly, which was inadmissible, if the jury believed, as they might well believe under the evidence, that there was a conspiracy between him and the defendant to kill Foulk."

State v. Williams, 113 Pac. (Wn.) 780.

Held:

"Even though no conspiracy be charged in the information, and the defendants are separately tried, evidence of conversations and statements of a co-defendant are admissible in a prosecution for obtaining money under false pretenses where there was a concerted action between them." (Citing cases.)

State v. McCahill, 33 N. W. (Iowa) 599.

There it is said:

"Evidence was introduced by the State against defendant's objection, tending to prove the acts of violence and threats of the strikers with whom defendant was associated at the time preceding the homicide. We think the evidence competent to show the purpose of the strikers to use violence in order to accomplish their unlawful purposes. As defendant acted in concert with the other strikers, to effect the purpose common to all, the evidence was competent to establish that purpose.

Many other objections are urged to the rulings of the district court upon questions relating to the admission of testimony. Some of these objections are based upon the ground that the evidence objected to, tends to establish 'other offenses.' *They tend to show un-*

lawful acts done in the execution of the plans and purposes of the defendant, and those with whom he acted in concert; thus tending to show the existence of a conspiracy, and that the homicide was done in the unlawful prosecution of its plans and purposes."

State v. Kennedy, 75 S. W. (Mo.) 979.

Held:

2. On the trial for murder under an indictment which charges defendant alone with the crime, and contains no averment of a conspiracy between her and third persons to commit the crime, evidence showing the conspiracy is admissible.

3. Where a conspiracy to the satisfaction of the trial judge is shown to have existed, the statements and acts of each conspirator, made or done in pursuance of the common design prior to the commission of the crime, may be shown against the others on their trial for the crime.

State v. Lewis, 79 S. W. 671.

"Where two defendants in a murder case were charged as principals, the declarations of one of them, at the time of the killing, were admissible under the information against the other. *It is well settled that the declarations and admissions of an accomplice in crime, made while the conspiracy exists, are admissible in evidence against an accomplice, and in order to render such evidence admissible it is not necessary that the information allege that a conspiracy existed.*" (Citing *State v. Kennedy*, 75 N. W. 679.)

Goins v. State, 21 N. E. 477 (Ohio).

“The admissibility of acts and declarations of a third person depend upon their having been made by a co-conspirator in furtherance of the common purpose. Much latitude is necessarily left to the trial court in determining whether or not there has been introduced sufficient *prima facie* proof of a conspiracy to admit evidence of the acts and declarations of one claimed to be a co-conspirator to the defendant on trial. In the case at bar there was some evidence of a common purpose. There being some evidence of a common purpose, the declarations of a co-conspirator in furtherance of it was competent evidence and the court did not err in permitting it to go to the jury. Counsel contend that, to render the acts and declarations of a co-conspirator competent evidence, the indictment should have, in express terms, charged a conspiracy. This is true where the act of conspiring is itself the crime charged; but, where some other act is the real offense, and the conspiracy is a common purpose leading to the commission of the main criminal act, a conspiracy need not be alleged in express terms, and, if any allegation in respect thereof is at all necessary, the charge in the indictment that it was jointly done is sufficient for that purpose.

Nor need the conspiracy be one to commit the identical offense charged in the indictment, or even a similar one; it being enough that the offense charged in the indictment was one which might have been contemplated as a result of the conspiracy.”

To same effect see:

State v. Payne, 10 Wn. 545; 39 Pac. 157;

State v. McCann, 16 Wn. 249; 47 Pac. 443; 49 Pac. 216;

State v. Dilley, 44 Wn. 207; 87 Pac. 133;
Goins v. State, 46 Ohio St. 457; 21 N. E. 476;
State v. Montgomery, 56 Iowa 195; 9 N. W.
 120;
State v. Walker, 98 Mo. 95; 9 S. W. 646;
State v. McGee, 81 Iowa 17; 46 N. W. 764.

The admissibility of the evidence introduced on the part of the Government, some of which has already been alluded to, being established, it follows as a necessary corollary that there is not only sufficient proof to charge Caminetti with responsibility for transporting and assisting in the transportation of Lola Norris for the purpose laid in the indictment, but that no other conclusion could have been legitimately reached. In fact it was Caminetti's intention to himself pay for the transportation of Miss Norris and Miss Warrington, Miss Warrington testifying:

(248) "After Reno was agreed upon, at first, Mr. Caminetti gave Miss Norris \$20. *He said for her to get the ticket for herself and me,* and Mr. Diggs said no, he thought that he should be boss of the four and he thought he had better get the tickets. Miss Norris kept the money. Mr. Caminetti said 'All right, you can be the boss'. That was said to Mr. Diggs. The way I understood it, Mr. Diggs wants to spend his money and then when he ran short, then Mr. Caminetti was to spend his money. Mr. Caminetti said he thought we ought to go separately. And then Mr. Diggs said no, that would bring about confusion and he thought it would be better if we should all go together. *At the time that Mr. Caminetti suggested that*

we should go separately he suggested that we should meet at the destination presumably. To take the same train but keep apart."

See also Transcript, pp. 266-267.

As to this matter Miss Norris testified:

(303) "When we agreed on Reno, just before Mr. Caminetti left he gave me \$20. I don't know whether he wanted me to buy my own or to buy my own and Miss Warrington's together. Immediately after that Mr. Diggs said that he would buy the tickets. He said if Miss Warrington and I went separately to buy our tickets, we would be sure to cause some suspicion and he said we would be much more likely to carry the affair off successfully if we would all go together; he said somebody ought to manage the party; that if each one wanted to follow his own inclination we would never make any headway at all; he said some one would have to manage the party and the others would have to abide by his decisions, and so *Mr. Caminetti said, 'I will make you the boss' and so Mr. Diggs took charge of the party. And Mr. Caminetti and Mr. Diggs were to share the expenses.*"

Thus we have seen that even after Diggs had stamped his disapproval upon the suggestion of Caminetti that Miss Norris should, with the \$20 just given her, purchase a ticket for herself and Miss Warrington, he nominated Diggs as boss of the party and agreed that the four of them should go together. At the same time and because of this change in plan, he agreed that the expenses of this joint venture should be borne by both and we have already shown by apt quotations from the testimony

how, after the party reached Reno, this arrangement and understanding was carried into effect by Caminetti sharing certain of the expenses.

It is idle for counsel to assert that no offense was committed by Caminetti because, before he was called upon to contribute any moneys towards the common cause, he might have repented. Like in many other classes of cases, when that stage was reached, repentance would have come too late.

So far as the charge here is concerned, it could make no difference whether Caminetti did or did not subsequently make any contribution, for by the time the party reached Reno,—in fact, the instant the train upon which they were riding passed over the State line—the offense had already been committed.

Mere payment of the railroad fare and for the Pullman tickets was a negligible quantity as compared with the mass of evidence inculcating both Diggs and Caminetti in the commission of the acts denounced by the White Slave Traffic Act.

**THE IMMORAL PURPOSE FOR WHICH LOLA NORRIS WAS
TRANSPORTED BY THE DEFENDANT WAS CONCLUSIVELY
SHOWN.**

The further contention is advanced by plaintiff in error in presenting this point, that the evidence fails to show that there was any immoral purpose connected with the transportation of Lola Norris into Nevada until after the parties had passed from California into that State.

This proposition is without foundation in fact and is equally devoid of merit.

In determining the intent with which the defendant transported and assisted in the transportation of Lola Norris from her home in Sacramento to Reno, the jury were entitled to take into consideration all of the evidence in the case. Even though the record were silent as to any declaration or statement made upon that subject, nevertheless from the acts and conduct of the parties, before and after reaching Reno, or from either, the jury would have been warranted in finding that the purpose was an immoral one and the one specified in the indictment.

The evidence here, however, specifically attests that the dominating idea in the mind of the defendant in having Lola Norris accompany him to Nevada was to there sustain illicit relations with her.

Upon many occasions before the night of March 10, 1913, the defendant in his endeavors to persuade Miss Norris to leave her home, told her that his relations with his wife were and had been unhappy; that a divorce would shortly be granted and that he would marry her. Upon this point Miss Norris testified:

(287) "Mr. Caminetti always told me that he was not living happily with his wife. He told me that on a great number of occasions. He told me several times that he and his wife were just about agreed to separate. I think he did say something about a divorce before March 1st, 1913, on one or two occasions. Prior to March 1st, 1913, he spoke to me about his feelings towards me. He told me he loved me. * * *"

And again, shortly before the parties left Sacramento, in testifying concerning a conversation between herself and Caminetti, she said:

(295) "We were to go away with them, with Mr. Diggs and Mr. Caminetti. Upon those occasions when I and he were alone he said he was not living happily with his wife. * * * On the Saturday before we left—that was the day before—Mr. Caminetti said that his wife would start action for a divorce, he knew, as soon as she found out he was gone, and then we would be married; but before that I don't remember Mr. Caminetti saying anything about what his wife would do."

And again, on page 299:

"When they spoke they said that their wives would start actions for divorce just as soon as they found that their husbands had gone, and Mr. Caminetti said that if his wife did not he would get a divorce within a certain length of time, if his wife had not taken any action. Mr. Caminetti said that we would be married after these divorces were granted."

The testimony of Marsha Warrington is substantially the same:

(244-245) "*They* told us that we had to go with them and that they would marry us when we left Sacramento and that after they had heard all these things they didn't think there was anything else for us to do. That was not the first time that the subject of marriage had been referred to. They discussed it the first time they mentioned leaving Sacramento. They said they would get divorces from their wives and marry us. Mr. Diggs said he no longer cared for his wife and he was unhappy. Mr. Caminetti said the same thing. He said he

could not get along with his wife. I think they said they thought their wives were going to get a divorce, but if they did not they were going to get them anyhow."

Of course the testimony does not show that Caminetti said to Lola Norris, "I want you to come to Reno with me for the purpose of having sexual intercourse with you". Nor did he say, "I want you to go there to be my mistress or concubine". It may be that the words "*sexual intercourse*" never passed between them. But the omission to use such language is of no consequence. If it were necessary to a conviction that the prosecution should show that language of the character indicated was actually used by the person sought to be convicted, the probabilities are that but few prosecutions would result in convictions.

The average man would not thus express himself in attempting to persuade a young girl of refinement to leave the home of her parents and flee the state to sustain illicit relations with him. It can make no difference what language was used if what was said or done is indicative of the fact that the illicit relations, the immoral purpose, was his ultimate object. No precise form of words and no particular character of conduct is essential. In this case, however, the very arguments advanced by Diggs and Caminetti in their entreaties, persuasions and demands clearly portray their purpose and intent. They were both married men. If an action for divorce were commenced in California by the

wife of Caminetti, it would have taken at least four months to have procured the making of an interlocutory decree and a year longer to have obtained the entry of a final decree. No action could have been commenced by him until after he had resided in Nevada for six months, and then the publications of the summons would have required another period of ninety days. The same situation existed as to Diggs. In the meantime, according to their own statements, and demonstrated by their own acts, they were to, as they did, live in illicit relations with the two girls.

The redirect examination of Marsha Warrington was conducted for the express purpose of eliciting from her what was actually said upon the subject of their future status, at which time she gave the following testimony:

(280) "MR. ROCHE. I would like to ask just one question, with your Honor's permission.

Q. Miss Warrington, you were asked upon cross-examination what the specific intent was with which the four of you went to Reno. What conversation was there among the four of you, yourself, Miss Norris, Mr. Diggs and Mr. Caminetti, as to what would be done by the four of you just as soon as you did reach Reno?

A. *We were to live there until they secured their divorces, which would be in six months.*

Q. *Live where and with whom?*

A. *Mr. Diggs and Mr. Caminetti."*

It is suggested by counsel for Caminetti that this conversation must have taken place after the train had crossed the State line. In this they are

confessedly in error. It was but a part of the many conversations in which the defendant and Diggs asserted that they would divorce their wives and marry the two girls.

But aside from this specific evidence, as was said in the case of

John Arthur Johnson v. United States of America, supra,

where the evidence disclosed that the plaintiff in error had previously sustained sexual relations with the complaining witness, and had frequently taken journeys with her for that purpose,

“This additional evidence furnished a basis from which the jury could justifiably draw the inference that when defendant furnished the transportation he did so for the purpose of having sexual intercourse with the girl upon their arrival in Chicago, just as a jury may reject a defendant’s protestation of innocence in passing counterfeits, when the evidence shows that prior to the act in question, he had habitually or frequently passed other similar counterfeits.”

See also

Kulp v. U. S., 210 Fed. 249,

where the following is stated:

“Sufficient evidence also was offered to prove his then existing intention and purpose, and it was not necessary that the words and the act indicating such intention and purpose should have been said and done within a particular geographical area. Acts done and declarations made afterward and elsewhere might be relevant to throw light upon the state of his mind

and his will while he was furnishing the transportation and persuading the girls to take the interstate journey in question. The learned judge submitted the evidence upon this subject to the jury with proper instructions."

And when, as here, the offense charged is one that involves the criminal intent or motive of the accused, it is permissible to introduce evidence of other acts and transactions of the party upon trial, of a kindred nature, to show his intent or motive in the particular act directly under investigation, even though it may show the commission of other offenses than that for which he is being tried. Indeed, in no other way, in many cases, could the fraudulent intent or motive of the accused be established, for the single act under investigation might not alone be decisive either way, but when that act is considered in connection with other transactions of a like or similar character occurring at or near the same time, which also involved the intent or motive of the party, the intent or motive in doing the act under investigation may thus be made to appear with almost conclusive certainty.

Colt v. U. S., 190 Fed. 307;

Wood v. U. S., 10 L. Ed. 987;

Moore v. U. S., 150 U. S. 57; 37 L. Ed. 996;

Williamson v. U. S., 52 L. Ed. 278;

Thomas v. U. S., 156 Fed. 897; 17 L. R. A.

(N. S.) 720;

Bryan v. U. S., 133 Fed. 495;

Olson v. U. S., 133 Fed. 849;

Commonwealth v. Jackson, 132 Mass. 16;

People v. Harris, 33 N. E. (N. Y.) 65.

While it is true that so far as the defendant is concerned, there is no evidence showing that he had sexual relations with Lola Norris prior to March 10, 1913, nevertheless it is quite apparent that this situation was brought about through no fault of his own.

That he had such relations in mind upon his nightly visits to Diggs' office, particularly upon the occasions when Diggs and Marsha Warrington would occupy one room and in that room maintain sexual relations while Caminetti and Lola Norris were in another room, would not be an illogical conclusion or inference.

That such was his purpose upon the San Francisco trip, after both Diggs and Caminetti had promised the two girls that if they accompanied them to San Francisco they would occupy one room together, is obvious. As to what transpired after the party had registered as husband and wife, and they had been assigned to their rooms, Diggs and Miss Warrington going to one room, and Lola Norris and Caminetti going to another, Miss Norris testifies:

(289) "After we got to the rooms I thought in order to avoid the suspicion of the clerk we would remain that way until he left and that then Miss Warrington and I would occupy one room and Mr. Diggs and Mr. Caminetti another. But as soon as the clerk left the room I went over towards the door of the room which Mr. Diggs and Miss Warrington occupied, and just before I got there I heard the key turn in the lock, and I went over to the door and knocked

and I called to them but neither of them paid any attention to me. I do not know whether they heard me or not but I knocked off and on for an hour or more and finally Mr. Caminetti told me that if I did not stop making so much noise, the clerk would come up and put me out and so I stopped. The room Mr. Caminetti and I had was a bedroom. Mr. Caminetti retired. *He spoke to me about retiring. I refused to retire.* I did not sleep very much that night. I think I took my shoes off. * * * *The defendant spoke to me while I was in the room at the Grand Hotel and after I failed to attract the attention of Mr. Diggs and Miss Warrington about getting into bed."*

And the next night at San Jose the situation was a little bit more pronounced. As to this she testified:

(290-291) "*Mr. Caminetti retired that night. He took his clothing off. I took my clothing off. Mr. Caminetti mentioned in that room that night about having intercourse. I did not submit to him. I am positive about that. When he desired me to have intercourse I said no. Mr. Caminetti knew that I never had had intercourse with any man."*

And while the evidence fails to show that the barriers surrounding the virtue of Lola Norris had been entirely broken down prior to the Reno trip, the record is replete with evidence showing that Diggs and Marsha Warrington had had intercourse upon a number of occasions,—in Diggs' office, in his own home, during the absence of his wife, in San Francisco, and in San Jose—and that all of these acts occurred with the knowledge and constant co-operation of Caminetti.

But in determining the question of intent and motive the jury was not confined to what had occurred prior to their departure from Sacramento. They had a right to consider, and in fact could have arrived at the conclusion which they did reach upon this subject, from what subsequently occurred.

The first night that the parties were together in Reno, they occupied adjoining rooms in the Riverside Hotel. Lola Norris and Caminetti occupied one room, Diggs and Marsha Warrington the other. All of them disrobed before retiring. While even upon this occasion Lola Norris denies having maintained sexual relations with Caminetti she testified:

(306) "While staying at the Riverside Hotel that night, *Mr. Caminetti said something about having sexual intercourse.* I did not permit him to have intercourse."

HOPE AND EXPECTATION ACCOMPLISHED.

From that night forward until their arrest, the parties occupied the bungalow rented by Diggs and Caminetti. In this bungalow there were two bedrooms. While there Miss Warrington and Diggs slept in the front bedroom, Miss Norris and Caminetti in the rear. They remained there for three nights. Upon each night, all of the members of the party disrobed before retiring. At last Caminetti accomplished the purpose long before con-

ceived by him in Sacramento. There for the first time in her life, according to Lola Norris, she had sexual intercourse with Caminetti. To this point she testified:

(307) *“During the three nights that I was there in that bungalow I had sexual intercourse with Mr. Caminetti.*

Q. *Was that the first time you ever had such sexual intercourse in your life?*

A. *Yes.”*

By no “flights of oratory”, by no amount of “impassioned argument”, or rhetoric, were counsel able to persuade the jury that Caminetti did not, upon the first night of his residence in the bungalow, carry into effect the “*specific intent*” formed by him before taking the Reno trip. The reasoning of plaintiff in error should be less availing here.

VII.

THERE WAS NO MISCONDUCT ON THE PART OF COUNSEL FOR THE GOVERNMENT DURING THE COURSE OF THEIR ARGUMENT, NOR ANY ERROR ON THE PART OF THE TRIAL COURT IN PERMITTING SUCH ARGUMENT AS MADE. EVEN IF THERE WERE ANY SUSPICION OF ERROR OR MISCONDUCT, THE SAME WAS CURED BY THE CHARGE OF THE TRIAL JUDGE.

At pages 207 to 249 of their brief, counsel for plaintiff in error argue, in subdivision VI of their Brief, the proposition stated in this language:

“The prosecuting attorneys committed reversible error in making improper comments and arguments to the jury, and the trial judge

likewise fell into error in permitting the prosecuting attorneys to make improper comments and arguments to the jury, and in not checking or reproving them at the time, but on the contrary in approving and endorsing the improper comments and arguments."

In support of their claim of alleged misconduct on the part of counsel, the following language of one or the other of the Government counsel is referred to. At page 207, misconduct is ascribed to Mr. Roche by reason of making the following remark:

"Mr. Woodworth would not state to you that he proposed to establish the defendant's innocence; the strongest he would go was that he would create a reasonable doubt."

Mr. Woodworth took exception to the remark of Mr. Roche.

"The COURT. I cannot recall definitely the opening statement.

Mr. ROCHE. The last remark that Mr. Woodworth made in his opening statement, the record will sustain my position, was that he expected to create a reasonable doubt in the minds of the jury as to the guilt of this defendant.

The COURT. I recall that he used that but I don't think that he stopped at saying he would raise merely a reasonable doubt."

At page 208 counsel set out the closing remark of Mr. Woodworth in his opening address, as follows:

"And, gentlemen of the jury, having established that, and having raised a reasonable doubt in your minds as to the real intent and

purpose of defendant in leaving Sacramento, in view of all the surrounding circumstances, we will ask you to give him the benefit of that doubt and acquit him."

The opening statement of Mr. Woodworth is not set out in the record. The sentence quoted from the record as having been his closing remark is not fully self explanatory. What was contained in the opening statement is nowhere made to appear, but at all events the remark made by Mr. Roche is fully justified by the closing language of adverse counsel, and if Mr. Roche were mistaken in his position as to what counsel had said, it would be a mistake or error of judgment which could not in any possible view constitute reversible error.

It frequently happens in the course of a protracted trial that counsel may be innocently mistaken as to a position taken by counsel, or as to some language used by a witness. If anything, the graver offense would be involved in making a misstatement of language supposed to have been used by a witness during his examination.

In this connection we ask attention to the case of *People v. Barnhart*, 59 Cal. 402.

The opinion was by Mr. Justice Ross, then of the California Supreme Court (decided in 1881).

The following appears in the opinion:

"At the trial in the court below the district attorney, in his opening argument to the jury, stated that the witness Brown testified that defendant, shortly after his arrest, requested him

to ask the prosecuting witness, Badger, to come and see him, and that Badger testified that during such visits the defendant said, 'I would not have taken the horse if I had not been drunk'—from which the district attorney proceeded to argue an inference of guilt, whereupon the defendant's counsel objected to such action on the ground that no such testimony was given in the case. The prosecuting attorney insisted that such was substantially the testimony as given. Counsel for defendant asked that the reporter's notes be read. The court stated to counsel that its recollection of the testimony, in that regard, accorded substantially with that of the prosecuting attorney, but that *the jury were the sole judges of what the testimony, if any, in that respect was*, and directed the prosecuting attorney to proceed, suggesting that in the mean time the reporter could look over his notes, and if it was found the prosecuting attorney was mistaken, the mistake could be corrected at any time before the argument closed. The prosecuting attorney, after stating that he thought he was correct in the matter, proceeded to address the jury, but no further in relation to the matter in question—to all of which the defendant's counsel reserved an exception, without asking to put before the jury the result of the reporter's investigation of his notes.

We see no merit in the exception. *An erroneous statement of the testimony to a jury by counsel in the trial of a cause is not an error for which a new trial will be awarded.* It would be strange if it was. It often occurs that counsel do not agree as to what the testimony is. Indeed, it rarely happens that they do. It is for the jury to determine that question, and so the court told the jury in this case, at the same time affording defendant the oppor-

tunity, of which he did not avail himself, to show from the reporter's notes just what the testimony was."

A similar question arose in the case of

People v. Lee Ah Yute, 60 Cal. 95.

The opinion of the court in bank was by Mr. Chief Justice Morrison. In the course of the opinion the Chief Justice said:

"The second point made, presents an exception to remarks made by the district attorney in his closing argument to the jury; and upon this subject the bill of exceptions shows the following facts:

'Mr. Marshall said, in closing for the people, an attempt has been made to impeach the character of the witness for the people, Hugo Habner. Counsel for the defense has attacked him in a bitter tirade. He is a man of good character, and had I deemed it necessary I could have produced witnesses to testify to his good character'; to which remarks the defendant objected, and had his exception noted. Thereupon the following additional occurred:

'The COURT. It has been sought here to try the case without any exceptions; and rather than there should be any exception, the court will order the remarks of Mr. Marshall stricken out—those which were objected to'; whereupon Mr. Marshall said: 'Very well, then, the argument, so far as making any indorsement of that man's character, goes for nothing—so far, I suppose, as I stated I was prepared to defend his reputation, if it has been impeached'. The judge then said 'Yes, strike that out also'.

In the case of *The People v. Runk*, decided January 22, 1878, the Supreme Court had before it the question of alleged improper re-

marks made by the district attorney in his closing argument to the jury, and such remarks were made the ground of exception on appeal. The court affirmed the judgment, but filed no written opinion. The affirmance of the judgment, however, involved the decision that *the case should not be reversed, because the district attorney went out of the record, and presented views of his own in the case.* The recent case of *The People v. Barnhart*, 59 Cal. 402, presented a similar question, and Mr. Justice Ross, delivering the opinion of the court, there says: 'We see no merit in the exception. *An erroneous statement of the testimony to the jury by counsel in the trial of a cause, is not an error for which a new trial will be awarded.* It would be strange if it was'. *Few cases would stand the test of an appeal, if the court below is to be held responsible for every license taken by attorneys in the argument of causes.* We do not wish to be understood as saying that there may not be such an abuse in this regard, as would make it the duty of this court to reverse the judgment of the trial court, but certainly there was nothing in the case with which we are now dealing that calls for a reversal. Objection was made by defendant's counsel to the remarks made by the district attorney, and the court below at once ordered them stricken out. They did not occur again in the argument, and the court did all in its power to remove any improper influence the remarks might have produced upon the jury."

In view of the doctrine of these cases we may well insist that even if Mr. Roche were mistaken as to the attitude of counsel for the accused with reference to the condition of the testimony in the record, his remark would in no case constitute

ground for reviewing the judgment of the trial court. Neither an erroneous statement of the language of a witness, nor of the language of counsel can, in law or in reason, become the occasion for reversing a proper judgment arrived at after weeks of arduous endeavor in a trial of the magnitude here involved.

As said by Chief Justice Morrison in the case of
People v. Lee Ah Yute, 60 Cal. 97,

“Few cases will stand the test of an appeal if the court below is to be held responsible for every license taken by attorneys in the argument of causes.”

At all events, immediately on the occurrence of the incident, Judge Van Fleet said:

“I recall that he used that but I don’t think he stopped at saying that he would raise merely a reasonable doubt.”

Furthermore Judge Van Fleet, in the spirit of caution and fairness that characterized his conduct all through the trial, in order to set at rest any controversy between adverse counsel as to such matters, and all matters as between counsel for either party and the court, repeatedly admonished the jurors that it was *their sole function to pass on all questions of fact* and to be guided by the law as declared by the court, uninfluenced by any declaration of court or counsel as to the facts, or by any declaration or contention of counsel for either side, as to the law.

The charge is incorporated in this brief at pages 23 to 44. The opening sentence of the charge is as follows:

“I ask your careful attention while I submit to you the principles of law that obtain in this case, and when I have done so it will be your duty to observe them and apply them to the evidence for the purpose of reaching your verdict, *to the exclusion of any suggestions that may have been made by counsel either here or through the newspapers, or that may have come to your attention from any other source.*”

Further along in the charge (pp. 34-5 of this brief) the trial judge admonished the jury in this language:

“While, as I have stated, it is the duty of the court to declare the law, and that of the jury to be governed by it in their consideration of the evidence, it is, on the other hand, *the province and right of the jury to pass upon the facts in the case* and the credibility of the witnesses. With those functions the court has nothing to do, other than to endeavor to see that only proper evidence is permitted to go before the jury for their consideration; and it is neither the right nor the disposition of the court to interfere with that duty of the jury. If, therefore, during the progress of this trial you have gathered or during this charge should gather any impression from anything which the court may have uttered in your presence, as to the views or judgment of the court on the question of the defendant’s guilt or innocence, or as to the weight of any evidence or the credibility of any witness, you will disregard such impression, should it not accord with your own views, and base your finding upon your own independent judgment as to what the sum

of the evidence discloses; and when I refer to the evidence I refer solely to such evidence as has been finally permitted to go in and remain before you for your consideration. *And in this connection I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness stand or in the way of exhibits or other physical objects which may have been laid before you.*”

As to the claimed mis-statement of counsel, which counsel for the plaintiff in error has aggravated into misconduct, we say, first: It is of infinitesimal consequence and could in no case constitute the basis of prejudicial or reversible error; second: The remark was evidently made by counsel in the belief that he was stating correctly the position of his adversary; third: If the matter were of such consequence that by any record it could be made a basis for reviewing the judgment of the trial court, a proper record has not been made for such review. Furthermore, if there were a record properly certifying to action on behalf of the accused to avail himself of the misconduct of counsel for the Government, the charge of the court would cure any possible infinitesimal error that might have existed.

In this connection we deem it proper to call attention to the language of the California District Court of Appeal of the First Appellate District in the somewhat noted case of

People v. Ruef, 14 Cal. App. 576.

At page 619 Mr. Justice Cooper, in speaking of the question of alleged misconduct of counsel, says:

“The rule requiring that the remarks of the district attorney must be *willful*, not *supported by the record*, and must contain a statement of something as a fact, either by direct statement or innuendo, and further that they must have been objected to or the court’s attention called to them, or else they will not be held error sufficient to reverse a case, is founded upon principles of justice and fair dealing. While such remarks when not justified might in some cases be prejudicial error and injurious to defendant, in other cases such remarks might prejudice the district attorney in the eyes of the jury. *Each case must be judged by its own particular circumstances*, and in our opinion, taking the remarks in this case, with the corrections and statements by the court, they could not have worked any injury to the defendant.”

Another case of alleged misconduct on the part of the prosecuting officer is

‘ *People v. Craig*, 152 Cal. 42-50.

In that case the district attorney who was apparently laboring under a misapprehension as to the condition of the record, made a statement which was not fully warranted, with reference to the conduct of the defendant. In brushing aside this alleged misconduct of counsel, the Supreme Court in bank, speaking by Mr. Chief Justice Beatty, said:

“The alleged misconduct of the district attorney does not call for extended notice. He did in one instance claim in his argument to the jury that appellant had shown by his own testimony that he was living off the earnings of women who had consorted with Japanese.

There was no evidence as to consorting with Japanese, but on the objection of counsel the court admonished the district attorney to confine himself to the evidence. He, however, still contended that such evidence had been given by Sargent Wilson. He appears to have been mistaken, but there is no reason to suppose that he had purposely misrepresented the testimony. In such a case *the recollection of the jury as to what the testimony of a witness was must be deemed a sufficient protection to the accused.* It is not like the case where the prosecuting officer *deliberately and purposely imputes to the accused a distinct and infamous offense regarding which there has been no evidence,* and where the court approves his conduct. *As to the terms in which the district attorney chose to characterize the offenses of the defendant, we cannot see that they passed the bounds of legitimate censure."*

EVEN IF THE REMARKS OF MR. ROCHE WERE IMPROPER AND BY ANY POSSIBILITY WERE ASSUMED TO CONSTITUTE MISCONDUCT, IT COULD NOT CONSTITUTE ANY BASIS FOR REVIEW BY THIS COURT, OR REVERSAL OF JUDGMENT.

The record on the subject of the various remarks of counsel (Mr. Roche and Mr. Sullivan), show that all that was done in each case was to *take exception* to the language of counsel. In speaking of the remarks of Mr. Roche as to Mr. Woodworth's attitude about defendant's innocence, the action taken on the part of defendant is thus noted:

(Brief p. 207) "Mr. WOODWORTH. We take exception to the remarks of counsel."

At pages 210-11, in speaking of the remark attributed to Mr. Roche—"He hides himself behind the respectability of a loyal wife", Mr. Woodworth merely noted an exception as follows (p. 211): "We take exception to the remarks of counsel as being highly inflammatory".

In referring to the remark of Mr. Roche—"The people of these United States are watching this case and waiting to ascertain whether, upon such a record as has been made here, and the law of this case as will be given to you by the court, this defendant shall go unwhipped of justice",—the only record made with reference to the alleged improper remark is—"Mr. Woodworth: We object to any such statement that the people of these United States are looking upon this case, as *inflammatory*, and intended to move the jury by passion. We except to such remarks."

At page 212, objection is made to the remark of Mr. Roche:

"The Government of these United States, gentlemen of the jury, whom we have the honor to represent here, your Government, as well as my Government, the Government of all of us, demands that *the laws enacted for the protection and preservation of its young and decent women be adequately and rigidly enforced*. An acquittal in this case would be a miscarriage of justice and it would be a blot upon the fair name and escutcheon of California.

MR. WOODWORTH. Another *exception* to those remarks."

Further exception is found on the same page, to the language of Mr. Roche given as follows:

“On behalf of myself, on behalf of the State of California, on behalf of the Government of the United States of America, I ask you gentlemen of the jury by your verdict whether you intend to do such as this.

Mr. WOODWORTH. We note an exception to that.”

In the case of certain language attributed to Mr. Sullivan, at page 214 and again at page 224, the exceptions noted by counsel for the accused are in substantially the same form. *In no case was the court requested to instruct the jury to disregard them*, nor did the court, after such request, refuse to do so.

The general rule on the subject of making the record on which to test the misconduct of counsel in a matter of this kind is thus stated in

12 Cyc., 585:

“NECESSITY FOR REQUEST FOR CORRECTION: Improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal, *unless the court has been requested to instruct the jury to disregard them, and has refused to do so.*”

A question of this character arose in the case of *People v. Molina*, 126 Cal. 505.

Mr. Chief Justice Beatty there, speaking for the court in bank, in connection with a claim of misconduct of the prosecuting attorney, said:

“The defendant excepted to the remarks, but *made no motion to have them corrected or the*

jury instructed to disregard them. It is now claimed that the remarks were prejudicial error.

* * * * *

(507) The defendant excepted to these remarks, but *made no motion to have them corrected or the jury instructed to disregard them.* The instructions are not in the record, and we must presume that the court correctly instructed the jury, and that they were told to disregard all matters and statements outside the record."

In the case at bar the court instructed the jury that they were to disregard as to matters of fact, all remarks and statements of counsel, and to be guided solely by the evidence as given by the witnesses on the stand, and by the exhibits submitted in evidence before them. There was no request whatever for instructions on behalf of the defendant with reference to any of these matters. There is no evidence in the record to show that on the request for such instructions the court finally, and at the time of charging the jury, failed to comply with such request.

In speaking of the alleged misconduct of counsel in that case, Mr. Chief Justice Beatty said:

(507) "The rule is well settled that it is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume in argument to the jury such facts to be in the case when they are not. (*People v. Mitchell*, 62 Cal. 412, and cases cited.) In this case, even with no evidence in the record, where the life of a fellow-creature is at stake, we would have no

hesitation in reversing the case if the remarks were erroneous when measured by the above rule, but they are not. There is no statement of any fact pertinent to the issue not in evidence. There is no charge against the character of defendant or his good name. There is no charge that he has been guilty of any offense or offenses other than charged in the information. The district attorney may have drawn upon his imagination as to the cessation of crime in Kern county after 1877, and as to the jury system being claimed by many to be a failure, but we cannot see how the remarks could have injured the defendant. The matters spoken of were probably as well known to the jury as to the district attorney before he made the statement. It does not appear to us whether they were in the record or not.

In the leading case of *Tucker v. Henniker*, 41 N. H. 323, it is said: 'The right of discussing the merits of the cause, both as to the law and facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury it is his privilege to descend upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify, or condemn motives, as far as they are developed in the evidence; assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination'."

In concluding the opinion, the Chief Justice uses this language:

“In this case, the record is entirely silent as to what action the court took in regard to the remarks and as to any instructions to the jury in regard to them. If the remarks were objectionable, and the record fails to show whether or not the court corrected the statement, it will be presumed here that the statements were corrected and the jury instructed to disregard them.”

The rule on the subject is again referred to by Mr. Chief Justice Beatty, speaking for the court in bank in

People v. Shears, 133 Cal. 154-159.

The fifth subdivision of the syllabus is as follows:

“A remark by the district attorney, to the jury, that it never occurred to him that the defendant was dazed, and that he had seen him the next day, was improper; but where the defendant did not invoke the action of the court to instruct the jury that it was improper, and to disregard it, but *merely excepted to the remarks of the district attorney, the impropriety is not ground for reversal of the judgment upon conviction of manslaughter.*”

At page 159 the Chief Justice says:

“The district attorney, in his address to the jury used this language: ‘It never occurred to me that the defendant was dazed, and I saw him the next day’. This was improper, but its effect would have been removed if the defendant had asked the court to instruct the jury

that it was improper, and to disregard it. *He did not invoke the action of the court, but contented himself with excepting to the remarks of the district attorney.*"

The objection to alleged misconduct was overruled and the judgment of the lower court affirmed.

A similar ruling was made by the Supreme Court of Washington in

State v. Regan, 36 Pac. 472.

In disregarding the alleged misconduct of counsel and affirming the judgment in that case, the Washington Supreme Court said:

"In making closing argument to the jury, counsel for the prosecution said, purporting to recite a part of the testimony, 'He (Regan) says to Hines, 'We are going to be arrested.' It is contended that this is error, for the reason that there is no evidence of any such statement in the record. Counsel for the defendant excepted to it, but it does not appear that he *moved to strike it out or asked the court to instruct the jury to disregard it. Consequently there is no foundation for any error in the premises.* Furthermore, it does not appear that such statement could have been prejudicial to the defendant, in any manner."

A similar ruling was made by the Supreme Court of Nevada in

State v. O'Keefe, 43 Pac. 918-919.

Another case recognizing this rule is

Collins v. State, 148 S. W. 1065,

decided by the Texas Court of Criminal Appeals in 1912. This is evidently the same case intended

to be referred to by counsel at page 213 of their opening brief, cited as *Collins v. State*, 145 S. W. 1065.

At page 1070 (S. W. Rep.), the court says:

“In bill No. 5 it is shown that the prosecuting officer in his argument stated, ‘Gentlemen of the jury, if you don’t convict the defendant in this case, there is no use for the grand jury of your county to hereafter indict any man for the detestable crime of assault with intent to rape committed in your county.’ The court instructed the jury not to consider these remarks as they were improper. *Appellant presented no special charge*, and, as the court instructed the jury not to consider the remarks, they are *not of such character as would present reversible error*. *Edwards v. State*, 61 Tex. Cr. R. 315, 135 S. W. 540, and authorities there cited.”

Another case in which the rule is referred to is *Edwards v. State* (Tex. Cr. App. 1911), 135 S. W. 540-4.

The 14th subdivision of the syllabus is as follows:

“Defendant cannot object on appeal to alleged misconduct of the state’s attorney in argument, *in the absence of a request for instructions with reference thereto*.”

And, in the opinion of the court, at page 544 the following is found:

“Complaint is made of the argument of counsel for the state. Defendant did not request any instructions, yet the court in its charge told the jury: ‘If in his argument any attorney for the state has represented the law to be

different from that given you by the court, or has misstated the evidence in any way not supported by the record in this case, then in such event you will not consider such portion of such argument.' In *Renfro v. State*, 42 Tex. Cr. R. 407, 56 S. W. 1019, the court says: 'Defendant complains of the argument of state's counsel. *The objection cannot be considered because no special requested instruction was asked by appellant,*' citing *Monticue v. State*, 40 Tex. Cr. R. 528, 51 S. W. 236; *Levine v. State*, 35 Tex. Cr. R. 647, 34 S. W. 969; *Wright v. State*, 37 Tex. Cr. R. 146, 38 S. W. 1004."

A late California case on the subject is

People v. Babcock, 160 Cal. 537.

In that case the defendant relied on misconduct of counsel which did not avail him on appeal. In disposing of his contention the court in bank, speaking by Mr. Justice Angellotti, said:

"Furthermore, defendant is in no position to avail himself of the claim of misconduct of the district attorney in this matter. He in no way invoked any action on the part of the trial court to obviate the effect of the statement, and the statement was of such a nature that any improper effect could have been avoided. He simply noted an exception to the remarks of the district attorney, as was the case in People v. Shears, 133 Cal. 159, where the district attorney made an improper statement. This court said: 'This was improper, but its effect would have been removed if the defendant had asked the court to instruct the jury that it was improper, and to disregard it. He did not invoke the action of the court, but contented himself with excepting to the remarks of the district attorney,' and the judgment was affirmed."

The judgment in the Babcock case was likewise affirmed.

A late decision by the District Court of Appeals is

People v. Warr, 22 Cal. App. 663.

At page 669 the court says:

“The deputy district attorney in his argument to the jury, and in the heat of his exhortation, went outside the established path marked out for prosecuting officers when he said: ‘But, gentlemen, *can you turn this man loose on the streets of this town and go home and sleep quietly in your beds?* You may think, ‘well, he won’t come to my place,’ and he may not; but I hope to goodness if you do, *I hope you will have the experience with him that we had.*’ But here again the defendant failed to make any request to the court that the jury be instructed to disregard the language of the prosecutor, and so failed to lay any foundation for a review of the objection, as was the case in *People v. Shears*, 133 Cal. 159. And conceding that there are cases where the misconduct may be of such a nature as to render an instruction from the court to the jury directing that no attention be paid to it, futile and unavailing, and therefore unnecessary to be asked for, the situation presented here does not illustrate such an instance. There may well be times when the judge, by a clear intimation as to his opinion as to facts of a case, improperly made to a jury, could not, by following the misconduct with a direction to the jury to disregard it, effectually clear the minds of the jurors of a prejudicial impression; but it very seldom happens that a mere observation of an attorney, expressed during the heat of his oration, fastens itself with such tenacity upon the minds of the jurymen as not to be dislodged by a direct instruction from the trial judge.”

Another late case of like effect, decided by the California District Court of Appeal, of the Third Appellate District is

People v. Stein, 23 Cal. App. 109.

In this connection see also

People v. Ye Foo, 4 Cal. App. 743;

People v. White, 5 Cal. App. 336;

Pearl v. State, 63 S. W. 1013-1917;

Moore v. State, 4 Tex. Cr. R. 70 S. W. 89;

Holt v. U. S., 218 U. S. 245; 54 L. Ed. 1020-9.

CAMINETTI HIDES BEHIND THE RESPECTABILITY OF A LOYAL WIFE.

At page 210 counsel for plaintiff in error designate as "inflammatory" the remark of counsel for the Government thus expressed: "He hides himself behind the respectability of a loyal wife." Why the remark should be considered inflammatory surpasses our ken unless it be that the suggestion of anything pure and undefiled is like a red rag to a bull, in the case of plaintiff in error. The poor wife whose loyalty had been strained almost to the breaking point, had smothered her pride and her sorrow sufficiently to render the aid of her personal presence and her voice, so far as she could truthfully, to shield him from the just and lawful consequences of his infamously cruel treatment of her.

It appears at pages 396-9 that she was a witness on his behalf, testifying simply to his nervous con-

dition and his peculiar actions during the days immediately preceding the Reno excursion. Welcoming the generous aid of a noble woman, whom he had deliberately insulted and spurned, it was natural and proper that adverse counsel should say, as the fact was, "he hides himself behind the respectability of a loyal wife." The remark was objected to on the ground that the same was inflammatory and not based on facts. The remark cannot be properly characterized as "inflammatory"; it certainly was not misconduct of counsel, nor was it claimed to be by counsel for the accused at the time.

ABANDONMENT OF HIS WIFE BY CAMINETTI.

At page 211 of their brief, counsel for plaintiff in error make another inflammatory objection to the remark thus expressed by Mr. Roche in his argument:

"He deserted and abandoned his family and left them without a dollar because on the date that he did abandon them, he assigned to some third party every dollar due him from the Board of Control.

Mr. WOODWORTH. We take an exception to the remarks of counsel as being highly inflammatory."

The fact is exactly as Mr. Roche stated it. The witness O'Brien, speaking of Caminetti, at page 382, says: "At the time he took the trip to Reno he owed me money." At page 383 the witness said:

"I remember the day he resigned his place on the Board of Control, the day he left for Reno.

Q. On that day did he borrow money from you on a salary demand for the month of March?

A. No, sir, he did not.

Mr. SULLIVAN. Q. You say he did not borrow from your firm on his salary demand?

A. He cashed a couple of checks with my firm but not with me. * * * I saw the checks the next day."

The witness Tehany was questioned with reference to this same matter at pages 196-7. On page 196 he identified a paper, the contents of which is shown at page 197. Speaking of the handwriting he says:

"I recognize the handwriting upon the document, or rather a letter dated March 10th, 1913 signed 'Drew Caminetti'. The signature is in the handwriting of Drew Caminetti, the defendant in this case. I brought this document to San Francisco this morning.

'The Lotus. . O'Brien & Austin.

To the State Controller:

Herewith I hand you my resignation as clerk of the State Board of Control. Please see that my warrant is delivered to Sacto. Valley Trust Co. today to cover checks drawn tonight.

Yours truly,

Drew Caminetti.'

Q. What was the salary of Mr. Caminetti as clerk of the State Board of Control?

A. \$150 a month.

Q. What amount of money was coming to F. Drew Caminetti on the day on which that resignation is dated?

A. \$45."

WHILE CAMINETTI AND DIGGS CLAIMED THAT THE OFFICERS OF THE JUVENILE COURT OF SACRAMENTO HAD ISSUED, OR WERE ABOUT TO ISSUE WARRANTS FOR THE ARREST OF THE WARRINGTON AND NORRIS GIRLS, THE FACT WAS THAT THE PARTIES UNDER INVESTIGATION BY THE OFFICERS OF THAT COURT WERE YOUNG GIRLS OTHER THAN LOLA NORRIS AND MARSHA WARRINGTON.

At pages 233-4, counsel for plaintiff in error thus refer to a remark made by Mr. Sullivan in his closing argument:

“MR. SULLIVAN. Now, gentlemen, we come to the other question. Now and then through the case there was a reference directly or indirectly made to it. They were frightened. But, gentlemen, not so much frightened by reason of their relations with Lola Norris and Marsha Warrington, but they were frightened because they had ruined other girls.

MR. WOODWORTH. We take an exception to that.

MR. SULLIVAN. Just wait a while, I will show you the record; I will show you the record.

THE COURT. That is the deduction which may be drawn from the evidence which is before the jury and counsel, has a perfect right to comment upon it.

MR. WOODWORTH. We except.”

It appears clearly from the testimony of M. J. Sullivan, probation officer connected with the Juvenile Court that the Warrington and Norris girls were not the girls whose relations with Diggs and Caminetti were under investigation. We ask attention to the record in that regard. The testimony of M. J. Sullivan is set out in the record at pages 238-242. At page 238 Sullivan said:

“I don’t know Miss Lola Norris; I know her by sight. I also know Marsha Warrington

by sight. I know F. Drew Caminetti by sight. I know Maury I. Diggs by sight.

Q. Prior to the 10th day of March, 1913, had any complaint of any kind or character been made, to your knowledge, to the Juvenile Court, or to any department of the Juvenile Court, regarding Marsha Warrington or Lola Norris?

(239) A. No, sir; I never knew there were any such parties in existence.

Mr. ROCHE. Q. If any complaint had been filed would you have known of it?

(240) A. Yes, sir."

At page 242 Sullivan was questioned by Mr. Woodworth as follows:

"Q. Were any complaints made to you personally with reference to these four persons previous to the month of March, 1913?"

A. Only as to one person, Mr. Diggs; our attention was called to the fact that some girls were going into the Diepenbrock Theatre Building and also a man named Johnson—Johnson Whitman, and a man named O'Brien. That was before the 10th day of March; that was not with reference to these girls. We have got those young ladies that they were mixed up with. We never knew there were any such parties in existence by the names of Marsha Warrington and Lola Norris. These reports with reference to the person whom I have described as Diggs, and another one as Whitman, was made during the time Mr. Diggs was in San Francisco. He was before the law here. It was in regard to the automobile. I went to his attorney, Mr. Charles B. Harris, who had returned from San Francisco, and I asked him to bring Mr. Diggs to our office, that I wished to talk with him concerning some young girls. That occurred before the 10th

day of March, may be four or five days. It was during the time he was in San Francisco, between that and the 10th day of March. Just a week before."

It appears, therefore, that in spite of the claim to the contrary, made by counsel for plaintiff in error, the fact was actually brought out by his own counsel that girls other than Lola Norris and Marsha Warrington furnished the occasion for the investigation by the officers of the Juvenile Court of Sacramento. And yet, his counsel in the brief here on file insist that counsel for the Government sought to introduce in the argument before the jury, matters not shown by the record.

On redirect examination, Sullivan further testified:

(242) *"I discovered who Mr. Whitman was. It was Mr. Caminetti, the defendant in this case. I subsequently ascertained who the girls were. They were not either Marsha Warrington or Lola Norris. One of the girls is now in the St. Catherine's Home, an institution here in San Francisco, and the other is at home with her parents."*

Notwithstanding that the threatened warrants and the possible arrest growing out of the illicit relations of these two married men with young girls had reference entirely to persons other than Lola Norris and Marsha Warrington, both Caminetti and Diggs made it appear to these frightened girls that they were the subjects of investigation and about to be arrested and made the fear growing

out of their statements, the main argument by which to induce the girls to take their hurried trip to Reno, Nevada.

At page 243 Marsha Warrington testifies:

"Mr. Diggs said there were warrants out for our arrest, that he had heard that the Juvenile authorities were after us and would have us sent to a reform school, or put under their jurisdiction, and he said their wives would sue us. Mr. Caminetti said that he had seen a policeman and he had told him that it was all over town, and even mentioned our names, and said we had better get out of town and he said there was nothing to do but to get out and he and Mr. Diggs said we had to go."

Not only does the record justify the remarks of counsel for the Government, but it shows that he stated the exact truth, and it shows further the absolute falsity of the position taken by Caminetti and his confederate in making the representations to these young women by which they were induced to flee with them, as criminals, to the State of Nevada.

The record shows beyond question that, instead of being a part of the Government case to show that the defendant had been tampering with other young women and girls in advance of the precipitate retreat on Reno, it was the supreme effort of the defense to show that Caminetti and his lustful confederate had so inextricably entangled themselves in the meshes of the law that in their own judgment it became necessary that they should both leave Sacramento. The purpose of the Gov-

ernment in the examination of Sullivan, the probation officer, was to show the utter falsity of Caminetti's claim, as urged upon the two girls, that warrants had been issued out of the Juvenile Court for the arrest of the girls. Furthermore, the very questions addressed to the witness that elicited from him the known relations of Caminetti and Diggs with girls other than Lola Norris and Marsha Warrington were propounded by Caminetti's own counsel, on cross-examination. In the face of this record showing this condition of facts, it requires superb courage for Caminetti's counsel to claim, as is done in the opening brief, that the Government is at fault for bringing evidence of other escapades on the part of these two confederates into the evidence submitted to the trial jury. Not only is the testimony in the record without objection or exception by Caminetti's counsel; but it is there by their direct procurement. In any event, the language of Mr. Sullivan was absolutely warranted by the facts in the record as set there by Caminetti's own counsel. It was a statement of the exact facts, or the inferences properly and clearly inferable from those facts.

LATITUDE ALLOWED PROSECUTING OFFICERS IN ARGUMENT.

The various expressions used by counsel for the Government in their argument are absolutely within the line of legitimate argument and they are,

in every instance, as we have shown above, based on the testimony shown in the record.

Counsel, to present cases on behalf of the Government, naturally and necessarily must have latitude to make statements based on inference, and to comment freely on the facts disclosed by the record, even though those facts portray a defendant in his real character.

A case in which the rights of counsel in this regard are recognized is

United States v. Flowery, Fed. Cas. No. 15,122.

There the court said:

“The objection is merely that counsel was allowed too great latitude in arguing, as to the inferences to be drawn from the evidence. If this were so, we should not, for that reason alone, disturb a verdict, rendered upon ample testimony, and with which the judge who presided at the trial, is entirely satisfied.

The course of argument to be allowed, must rest in some degree, at least, upon the judicial discretion of the court. A line of argument, clearly unfounded or irrelevant, would not be permitted. But there are many cases, and especially those which are voluminous and complicated, in which it may well be presumed that *counsel perceive bearings and applications of evidence, which are not at once apparent to the court*; and when it is made a question whether the evidence tends to a certain conclusion, the views of counsel, in other words, his argument, must be heard, before the court can be called upon to decide. This will be in the presence of the jury, and it will not generally be material, whether it be in form ad-

dressed to them, or to the court; but it will conduce to the convenience and dispatch of business, that the argument should at once be addressed to the jury, and the court afterwards should give such instructions as they may deem proper.”

A much more recent case was determined by the New York Court of Appeals, and is reported as:

People v. Conklin, 175 N. Y. 333; 67 N. E. 627.

The Court there said:

“The district attorney, in opening the case to the jury, stated with considerable detail, the facts bearing upon the conduct of the defendant towards his wife during the six years of their married life, as he expected to prove them. The learned counsel for the defendant objected to many of these statements, and called the attention of the court to some of them, and, upon the refusal of the court to interfere, took exceptions. Nothing was said in the opening address that exceeded the *proper limits of advocacy*. *The prosecuting officer has the right to try his case in the same way and subject to the same rules as other counsel. It is only when he resorts to violent denunciation, and to matters not embraced in the proofs or involved in the issue, that the court may interfere.* So long as the opening or closing address is based upon facts intended to be proved and pertinent to the issue, or upon facts which the *proof tends to establish*, the manner of presenting them must be left very largely to the good sense and good taste of the advocate, and the watchful vigilance of the trial court. *The case must be quite exceptional where a question of law, reviewable in this court, is presented, based upon the address of the prosecuting officer.*”

A somewhat noted California case bearing upon this same question is:

People v. Burke, 18 Cal. App. 72.

At page 101 the court says:

“The district attorney’s closing argument is made the subject of animadversion by appellant. It is declared that he ‘threw aside all discretion and all pretense of fairness and loudly declared to the jury in substance and effect that *the people of the state of California had already found the defendant guilty and further threatened that the citizens of the state were watching and that the jury would not dare to do anything but so declare by their verdict.*’ It is asserted that ‘the books do not record a more flagrant instance of gross violation of a defendant’s rights, or more far-reaching in its prejudicial effect’. It is apparent, though, that appellant, in characterizing and condemning the utterances of the district attorney, has manifested far more heat than did that officer, in his address to the jury. Here is what he said: ‘*Let us have a law that is equal for rich and poor, for those in high estate and those in low estate, and a law like that if so administered will enjoy the confidence, deserve the reverence and support of the people of our state. Tonight the people of our state look here to you. They are not looking here—those who are familiar with the facts of the case—to find out whether or not the defendant is guilty. They have conceded that he is. They are looking here to find out if a court of justice is going to declare him so.*’ An exception was taken to the statements and the court said: ‘That statement as to what the public or other people think about it is to be disregarded by the jury. It is not proper matter for their consideration at all.’ The first part of the above extract from the address

sounds like a quotation from the Declaration of Independence and the latter part means simply that the people who are familiar with the facts of the case have already conceded that the defendant is guilty and they expect justice to be meted out to him. It contains nothing like a threat, and it could be considered by the jury only as *an expression of the opinion of the district attorney that the facts of the case were sufficient to convince anyone of the guilt of defendant. The whole argument of the district attorney necessarily implied that he believed the defendant to be guilty, and that any fair-minded man familiar with the facts must reach the same conclusion.* Of course, as held in many decisions, the range of discussion, illustration and argumentation of counsel is very wide; matters of common knowledge and historical facts may be referred to and interwoven in the argument, and allusion may be made to the prevalence of crime and the duty of the jury. (People v. Molina, 126 Cal. 507 (59 Pac. 34); People v. Glaze, 139 Cal. 159 (72 Pac. 965); People v. Soeder, 150 Cal. 12 (87 Pac. 1016); People v. Craig, 152 Cal. 50 (91 Pac. 997); People v. McRoberts, 1 Cal. App. 25 (81 Pac. 734); People v. Ye Foo, 4 Cal. App. 740 (89 Pac. 450); People v. Amer, 8 Cal. App. 139 (96 Pac. 401); People v. Ruef, 14 Cal. App. 583 (114 Pac. 57).)

But if the remarks should be considered improper, we must presume that any injurious effect was forestalled or removed by the direction of the court. (People v. Putnam, 129 Cal. 262 (61 Pac. 961); People v. Benc, 130 Cal. 165 (62 Pac. 404); People v. Shears, 133 Cal. 159 (65 Pac. 295).)

Manifestly some allowance must be made for the zeal of attorneys and some confidence reposed in the intelligence and fairness of the

jury, and it may be said, generally, that *every statement of the district attorney criticized by appellant is less objectionable than what has been held by the supreme court to be insufficient to warrant a reversal of the judgment.*"

Holt v. United States, 218 U. S. 245-254; 54 Law. Ed. 1021-1029.

The sixth syllabus is as follows:

"The conduct of a Federal district attorney on a trial for murder, in characterizing as confessions certain alleged statements of the prisoner which were excluded because they were not freely made, does not require a reversal of the conviction, where the court told the jurors that they were to decide the case on the testimony of the witnesses, and not on what counsel might say.

In the opinion of Mr. Justice Holmes uses this language:

"In his opening the district attorney stated that the prisoner admitted that a coat with soot marks upon it, and a gunner's badge were his, and was going on to recite further statements, when they were objected to. The district attorney answered that these were voluntary confessions, but that he would omit them, if objected to, until the proper time, and desisted. Objection was made to the word 'confessions', and the judge replied that he did not hear any statement that the prisoner made any confession. *No instruction was asked, but as we have said, the judge told the jury that they were to regard only the evidence admitted by him, not statements of counsel, etc.* The attempt to get in the evidence is criticized also as unduly pressed. We see no reason to

differ from the judge's statement upon a motion for a new trial, that the United States attorney was guilty of no misconduct. The exceptions on this point also are overruled."

Another case illustrating the latitude allowed in argument is:

People v. Ye Foo, 4 Cal. App. 742.

There the court said:

" 'The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, fortify or condemn motives, as far as they are developed in the evidence; assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as varied as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination.' This case was referred to and approved in *People v. Molina*, 126 Cal. 505 (59 Pac. 34).

In *People v. McMahon*, 124 Cal. 436 (57 Pac. 224), the district attorney, after speaking of the defendant as 'Old Harris, the whisky seller', said that *he 'ought to be in the penitentiary'*, and the court held that the language was not sufficient to call for a reversal of the case.

In *People v. Wheeler*, 65 Cal. 77 (2 Pac. 892), it was held not to be error when the district attorney said to defendant, '*You sought this trouble with him and made a cowardly attack on him*'.

In *People v. Glaze*, 139 Cal. 159 (72 Pac. 965), the language of the district attorney was (referring to defendant): ‘*When this foul fiend of hell sent Trewella to his Maker, the motive came from a heart as black as the crime committed.*’ It was held not to constitute error.

In *People v. Soeder*, 150 Cal. 12 (87 Pac. 1016), the remark was: ‘*This man Leon Soeder would cut another man’s throat any day in the week, whether he wanted to marry Catherine Flatley or not,*’ and it was held not to constitute error.

In *People v. Weber*, 149 Cal. 325 (86 Pac. 671), the attorney general stated his *solemn belief in the guilt of defendant*, and it was claimed that he committed error, in so doing. The court said: ‘*A prosecuting officer, therefore, has the right to state his views, his beliefs, his conviction as to what the evidence establishes.*’ (See, further, *People v. Romero*, 143 Cal. 460 (77 Pac. 163); *People v. Salas*, 2 Cal. App. 537 (84 Pac. 295); *Hawkins v. State* (Tex. Cr.), 71 S. W. 756; *State v. Millmeier*, 102 Iowa, 692 (72 N. W. 275).)”

Another recent case by the California District Court of Appeal, Third Appellate District, is:

People v. Stein, 23 Cal. App. 108.

At page 118, the court says:

“It is urged that the district attorney, in his address to the jury, was guilty of misconduct which seriously militated against the defendant by declaring that, if there ever was a case arising in his experience of six years as district attorney, *in which there was disclosed on the part of any man accused of murder ‘an abandoned and malignant heart— * * * an utter abandonment * * * to regard human life as sacred— * * * it is the case of this*

defendant, Andrew Stein, on trial here today for his life.'

The foregoing language was, in our opinion, *perfectly justified by the evidence*. We have said as much in another part of this opinion. We can conceive of no stronger evidence of 'an abandoned and malignant heart' than that which discloses the act of deliberately and recklessly discharging a gun into a crowd of people with a total disregard of the consequences thereof. But if it were to be said that the language was wholly unwarranted by the record and imported into the case matters wholly foreign to the issues, it is to be remarked that the defendant is hardly in a position justly to complain of any damage which might have followed therefrom, since it does not appear in the record that he objected to the remarks complained of when made or called the attention of the court thereto at the time, so that they could have been ordered stricken out and the jury instructed not to pay heed to them. Over and over again, the appellate courts of this state have held that objectionable remarks by the district attorney in a criminal case will not be reviewed or considered unless they have been objected to at the time they were made so that the trial court may be accorded an opportunity to counteract, if it can thus be done, their effect upon the jury." (Cases cited.)

In *Valentine v. State*, 159 S. W. 26, decided by the Supreme Court of Arkansas, July, 1913, at page 28 the court said:

"We have examined the objections made to the remarks of the prosecuting attorney in his closing argument to the jury, and it is unnecessary to set them out in the opinion. It is sufficient to say of these that they were

but the *expressions of the opinion of counsel on behalf of the state that the appellant, under the circumstances shown in evidence, was guilty of the highest crime known to the law, and that it was the duty of the jury to so find by their verdict. These remarks were clearly within the bounds of legitimate argument.* Leonard v. State, 152 S. W. 590; Williams v. State, 100 Ark. 218, 139 S. W. 1119; James v. State, 94 Ark. 514, 127 S. W. 733."

EVERY STATEMENT OR SUGGESTION MADE BY EITHER OF THE GOVERNMENT COUNSEL AS TO THE FACTS BEFORE THE JURY, THE GUILT OF THE DEFENDANT, THE SANCTITY OF THE HOME, THE IMPORTANCE OF THE CASE UNDER CONSIDERATION, WAS FULLY WARRANTED BY THE RECORD DIRECTLY OR INFERENTIALLY OR WAS A LEGITIMATE SUBJECT FOR COMMENT OR SUGGESTION BY COUNSEL IN THE PROPER PRESENTATION OF THE CASE TO THE JURY.

The case of alleged misconduct of counsel presented by plaintiff in error is absolutely without merit. No statement of counsel as to the facts is without abundant warrant in the record. Many of the cases cited above, especially the California cases, fully justify language even stronger than that used by counsel for the Government in the case at bar. As said by the New York Court of Appeals in the Conklin case:

"The prosecuting officer has the right to try his case in the same way and subject to the same rules as other counsel."

There is nothing in the position of a public prosecutor that requires that he should be muzzled when

it becomes his duty to present the facts of an important case for the consideration of the jury. It is not only his privilege, it is his duty to present those facts as he sees them, for the proper consideration of the twelve men chosen for the time being to sit as judges and pass upon the facts.

As further said by the New York Court of Appeals:

“It is only when he resorts to violent denunciations and to matters not embraced in the proofs, or involved in the issue that the court may interfere.”

We have in the preceding pages shown that every utterance of counsel made in the argument, was directly warranted by the record, and was a statement of a fact absolutely shown therein or an inference from such fact which might naturally and properly be deduced therefrom. The plaintiff in error relies especially on the case of

People v. Hail, 19 Cal. App. Dec. 298.

The facts of that case are as widely dissimilar to the facts of the case at bar as it is possible to be. Furthermore, in the *Hail* case, as said by the court, there was a “manifest paucity of evidence tending to establish the guilt of the defendant”. In the case at bar there is an absolute plethora of evidence establishing beyond question the guilt of the accused. A portion of the language complained of in the *Hail* case is thus set out, at page 309:

“In the course of his argument to the jury, the district attorney said: ‘Men have been acquitted who have committed cold-blooded murder, and if you were to acquit this man under the testimony here *you would be allowing a cold-blooded murderer with human gore yet dripping upon his hands to go unwhipt of justice; gentlemen, you cannot do it, you will not do it. Should you do it you would be afraid to go out on the street and meet your fellow-men.*’ ”

* * * * *

Speaking of this violent language the court said:

“That the effect of the statement that the jurors, in the event that they acquitted the defendant, *would be afraid to go out upon the public streets and meet their fellow-men, was to intimidate or influence them to return a verdict of conviction, regardless of their views as to the effect of the evidence, cannot for a moment be doubted.* Whether the language referred to was used in good faith or for the purpose of influencing a verdict, is immaterial. The vice and damaging effect of the utterance upon the rights of the accused remained. *In a case where evidence of guilt was overwhelming or conclusive, we might justly say that the language was not prejudicial in its effect upon the legal rights of the defendant, although the use of such language would in such case be none the less reprehensible. But this is, as we have shown, not such a case.*”

Even language of the character quoted by the court in the *Hail* case would not, in its judgment, be sufficient to warrant the setting aside or reversal of the judgment if the testimony in the

case were clear and satisfactory. In the case at bar the testimony, beyond question, must have satisfied any jury composed of sane men that the defendant at the bar was guilty of the offense charged against him, certainly so far as the first count of the indictment was concerned. It is evident that the jury in the *Caminetti* case were not swept off their feet or swerved from their ordinary judgment as men, by any impassioned or unwarranted statement of counsel, or suggestion of any consequences to attend them after their release from the jury box. No threat was conveyed or suggested in any language of counsel. Counsel did very appropriately call attention to the sanctity of the home. And why should they not? The sacredness of four homes was shattered, two homes of young girls were invaded, four households were broken up. Why then should not counsel representing the Government feel responsibility resting upon them to speak of the sanctity of the home. It was a subject well worthy of presentation to an American jury in considering a case of the character here involved.

This argument is reaching such proportions that we cannot discuss at length and in detail every case suggested by counsel as affording a basis for the argument presented by our adversaries on the score of the alleged misconduct of counsel for the Government. Many of the cases cited in support of their position, on page 213 of their brief, are cases

in which the judgments of the trial courts were affirmed. One of them (*Collins v. State*, 145 S. W.) is a case to which we have above called attention as supporting our position. We shall content ourselves by calling attention to a few cases in which language far more deserving of criticism than any language used by counsel in this Caminetti case, has been justified, and refused consideration as a basis for reversal of judgment of conviction.

Bowen v. State (Ark. Oct. 19, 1911), 140 S. W. 28.

At page 31 the court said:

“The prosecuting attorney, in his closing argument, further stated: ‘The automobiles of the town are attempting to control and monopolize the streets, and if they are not stopped they will run you and me who do not own them off of the streets. It is a pity that the defendant had not been indicted for murder in the second degree and convicted for it, and if it were possible at this late time to so convict him he would ask them to give him the limit for that offense.’ And further: ‘For the protection of your wives and your little children on the streets and highways, I appeal to you to stop this reckless driving of automobiles that you see from time to time on the streets by making an example of this defendant, by giving him the limit at hard labor in the penitentiary.’ Objection was made to these remarks and exception to the ruling of the court in permitting them was duly saved.

The argument of the prosecuting attorney, taken as a whole, was but an expression of his opinion to the effect that the evidence showed that the appellant was guilty, and a denuncia-

tion by him of the violation of the law in running automobiles in such a manner as to interfere with the rights of other people who are also entitled to use the streets. It was but an admonition to the jury to the effect that the law was being violated in the running of automobiles, that this particular instance was in violation of the law, and that it was their duty to punish such violations. It was an appeal to the jury to enforce the law in order to protect the rights of the people and the public in general. *The prime object of all criminal statutes is to prevent the commission of acts that will interfere with the personal rights of others, and the purpose in punishing those who have committed such offenses is to inflict personal pain and suffering only as an example to others who may be similarly inclined, in order to deter them from the commission of like offenses, and thus preserve the public welfare."*

State v. Hilton (Mo. Sup. Ct. March, 1913),
154 S. W. 729.

In that case the court, in speaking of this subject of misconduct of counsel, said:

(733) "While it is true, as insisted by the defendant, that 'criminal cases should be determined by the evidence adduced and the law as defined in the instructions', *where the prevalence of a crime is shown and there is other ample evidence of defendant's guilt, an appeal by the prosecutor to the jury for a conviction on account of such prevalence is not unauthorized.* Such an appeal, couched in far more objectionable words than in the case at bar, was approved by this court in *State v. Zumbunson*, 86 Mo. 111."

McElroy v. State (Ark. 1913), 152 S. W. 1021.

The court there said:

“Prosecuting attorneys certainly have the right, in the name of and for the peace and welfare of society in general and of those who have been immediately and specifically injured by the commission of heinous crimes, to appeal to the jury to do their duty in the punishment thereof. As was said by us in a recent case: ‘The remarks of counsel do not, we believe, transcend the bounds of legitimate argument as marked out by many of the previous decisions of this court.’”

Williams v. Commonwealth (Ky. 1913), 156 S. W. 372.

In that case the court, in discussing a similar question, used this language:

(375) *“But it is insisted that the judgment should be reversed because of the improper argument of the commonwealth’s attorney. The language complained of is as follows: ‘At the beginning of this term of court there were nine murder cases on the docket. Now, gentlemen, this is a deplorable state of affairs, and it will never be stopped until we send some of them to the chair.’ The record further shows that counsel for appellant objected to the foregoing statement, and the court sustained the objection and withdrew the statement from the consideration of the jury.”*

Moore v. State (Tex. 1902) 70 S. W. 89.

In that case the following is shown in the opinion of the court:

“Appellant also excepted to the action of the court permitting W. M. Imboden, representing

the state in the prosecution, to use in his argument the following language: 'If you do not hang this man, you ought to petition the legislature to exempt Sabine county from capital punishment, and then apologize to every good citizen of Sabine county for rendering any other verdict.' And again: 'This is the foulest murder ever committed in Sabine county. The juries of Sabine county have the reputation of never hanging anyone. Now, *this jury has a good chance to redeem that reputation, and they ought to do it by hanging this man.*' We do not think it is a violation of the rules governing arguments by the prosecution to insist, where the evidence justifies it, on the infliction of capital punishment; and if we recur to the statement of facts, which we are authorized to do, there is ample testimony which authorizes the state to insist on the infliction of capital punishment. It does not occur to us that the language here used was of a denunciatory character, but was *merely an indication to the jury that they should discharge their duty.* At any rate, there was no requested charge on the part of appellant's counsel to have the court instruct the jury to disregard said argument; and in the absence of such request and refusal by the judge, and bill of exceptions reserved thereto, the language here used is not of that character authorizing a reversal."

Pearl v. State, 63 S. W. 1013.

At page 1017 the Court of Criminal Appeals of Texas said:

"In his second bill of exceptions he complains of the following remarks of the state's counsel: '*Return a verdict in this case that will be approved by the good citizens of Brown County.*'"

The judge, in approving the bill, states that appellant excepted to the remark above quoted, and that he immediately instructed the counsel to keep within the record; that there was no request that he instruct the jury to disregard the same. We do not think the remark was calculated to injure appellant; and, furthermore, no special charge being tendered the court to instruct the jury to disregard the testimony, he cannot now be heard to complain."

Blalock v. State (Ala. 1913), 63 So. 26.

In discussing alleged misconduct of counsel, at page 27, the Supreme Court of Alabama said:

"The excerpt from the argument of the solicitor set out in the bill of exceptions, to which objection was offered, and to exclude which a motion was made, cannot be taken to mean more, when construed in connection with the evidence, than that it was the duty of the jury to convict the defendant, if the evidence was sufficient, for the purpose of deterring others from committing similar offenses. This is one of the objects sought to be obtained by the enforcement of the criminal laws and punishment of offenders against it. *At most it could be deemed no more than an argument, intended to illustrate the evil consequences that might result from the failure of a jury to do their duty in the premises if the evidence was sufficient to authorize a conviction.* It does not appear from the isolated excerpt set out that the solicitor was asserting any fact, and it is not error to refuse to exclude the argument of counsel, although not strictly pertinent, when no fact is asserted, but simply an inference is drawn and argument made thereon."

Shows v. State (Mississippi, 1913), 60 So. 726.

In that case the district attorney, in the course of his argument to the jury, said:

“If you don’t convict this defendant on this testimony, you might as well tear the roof off the court house and throw the law books away.”

In disposing of the alleged misconduct of counsel relied upon by the appellant in that case, the court said:

(727) “We find no reversible error in the remarks made by the district attorney. It appears that the appellant was properly tried and convicted.”

Johnson v. State, 50 S. W. 343.

In that case, the Court of Criminal Appeals of Texas, thus disposed of a question of this character:

(344) “Appellant’s first assignment of error in his motion for new trial is that the court erred in permitting the district attorney, in his closing argument to the jury, to use the following language: ‘Gentlemen of the jury, we often hear the people say that they look to the juries for protection. *You cannot stand guard over your pure and innocent daughters, whom you so dearly love; but the people look to the jury to protect them against the crimes of rape, murder, and other crimes committed by such creatures as the defendant.*’ The bill of exceptions upon which this assignment is predicated contains this qualification by the trial judge, to wit: ‘The foregoing bill of exceptions is allowed and approved, with the following modification: In the remarks excepted to, there was

no reference made in any manner to the defendant, but they consisted merely of a statement to the effect that the people looked to the juries for protection against all crimes, from murder and rape to theft.' With this qualification, we fail to see how the rights of appellant in the premises have been prejudiced or injured.'"

Authorities such as we have cited in the preceding pages of this subdivision of our argument might be multiplied indefinitely. At the expense of seeming tiresome, we have cited more than were really necessary. While as upon all subjects open to judicial discussion, there may be divergence of opinion as to the dividing line between proper argument by prosecuting officers and that which may justly be regarded as misconduct, no case cited by adverse counsel, nor any case which has come under our own observation, warrants the claim that either of the Government counsel in the case at bar exceeded the limits of proper argument in presenting the case to the jury. The statements as to matters of fact were directly grounded on testimony contained in the record, or they were inferences naturally and logically deducible from such testimony. Counsel were justified in their denunciation of the proven conduct of defendant. They were justified in characterizing that conduct as violation of the sanctity of homes. They were justified in their claim that defendant was clearly guilty of the offense charged. They were justified in calling upon the jury to do their sworn duty and to vindicate the outraged majesty of the law.

VIII.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING THE SEVERAL INSTRUCTIONS REQUESTED BY THE DEFENDANT, NUMBERED 99, 100, 107, 109, 111 AND 114, ADVISING THE JURY THAT THE MERE PRESENCE OF CAMINETTI WITHOUT ANY ACT OF PARTICIPATION ON HIS PART, CONSTITUTED NO OFFENSE.

At pages 249 to 260 of their brief counsel for plaintiff in error argue the proposition stated in this language:

“The trial court erred in refusing to give the several instructions requested on behalf of the defendant, advising the jury that mere presence by the defendant Caminetti without any act of participation on his part did not constitute the commission of any offense so far as he was concerned.”

The several instructions referred to are set out at pages 249 to 254. The testimony called to the attention of the court in the preceding subdivisions of this argument shows vastly more than Caminetti's “*mere presence*” at the time of the commission of the offense as charged and proven against Maury I. Diggs and himself. Caminetti was not a mere spectator; he was an actual and active and very energetic participant therein. He was forceful in argument and resourceful in funds. He suggested that Diggs be made the boss or manager of the party and that Diggs alone, instead of any other of the party should actually purchase the tickets, while he, Caminetti, “stood around” with the girls in the shadow of the station building so that the party

might not be observed while the tickets were being secured for their transportation. The facts assumed in the instructions referred to were without foundation in the testimony. Nothing in the testimony tended to show that Caminetti was a party to the action only by reason of his "mere presence" or his mere knowledge of what was being done by Diggs. The testimony given by the girls established the direct contrary and no word of denial or explanation escaped Caminetti during the trial. Assumption of the mere presence and knowledge by Caminetti without participation, certainly had no foundation in any fact established by the record. The testimony as to Caminetti's connection with the actual transportation of the girls is so fully set forth in the preceding pages that we make no further reference to it at this point.

IX.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION NO. 116.

At pages 261-263 of their brief, counsel argue the proposition thus stated:

"The trial court erred in refusing to give instruction No. 116 requested on behalf of defendant."

A part of the instruction was in this language:

"It must further appear to your satisfaction beyond reasonable doubt that the \$20 or some portion thereof was actually used by Lola

Norris or Marsha Warrington to purchase a railroad ticket to Reno as charged in the indictment. If it does not so appear to your satisfaction and beyond a reasonable doubt, it will be your duty not to consider the mere giving of the \$20 by the defendant. * * * to Miss Norris for the purpose of purchasing her ticket and that of Miss Warrington, as any offense within the meaning of the White Slave Traffic Act."

The instruction as requested would certainly have been misleading. It certainly was not essential in order to make out a case against the defendant for aiding in the transportation, to show that the \$20 given by him to Lola Norris had been actually expended either in the purchase of a ticket for herself or for one for Marsha Warrington, or tickets for both. The offense as against Caminetti might well be established by the testimony, if all the evidence on the subject of the \$20 was actually eliminated from the record. The giving of the \$20 to Lola Norris shortly before train time was not the only or the main evidence relied upon by the prosecution to establish Caminetti's complicity in the transportation of the girls to Reno. His co-operation with Diggs in the arrangement of the details of the trip have been sufficiently set out in the preceding pages to render it unnecessary that we should here repeat the testimony of the several witnesses. In any event the giving of the \$20 by Caminetti to Lola Norris was a circumstance to be considered in connection with the other evidence in the case in order to enable the jury to determine whether or not Cami-

netti aided or abetted Diggs in the actual purchase of the tickets and in the transportation of the girls.

X.

THE COURT COMMITTED NO ERROR IN REFUSING INSTRUCTION NO. 31 REQUESTED BY DEFENDANT.

At pages 264 to 266 defendant argued that error was committed by the trial court in refusing an instruction requested, in this language:

“In considering the testimony of the witness, Lola Norris, and determining the credibility to be attached thereto and the weight to be given her evidence, you may consider her motive in testifying, whether or not she has been or appears to be acting under the influence of any person or persons, whether or not any promise of immunity has been promised to her, and any hopes she may have for leniency in any criminal action brought against her.

Counsel justify their claim of error on the part of the trial court by certain testimony set out on pages 264-266. An examination of that testimony and of all of the testimony in the record bearing on the same question, discloses no reason for the giving of an instruction by the court in the language quoted.

The record shows no promise of immunity or any offer of leniency by the Government as a consideration to the witness Lola Norris for testifying to the facts in connection with the Reno trip. Beyond all question the facts, conditions and circumstances

of that trip were as detailed by her. Certainly Caminetti did not contradict her.

XI.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING REQUESTED INSTRUCTION NO. 13 (REC. 447) OR INSTRUCTION NO. 79 (REC. 458).

At page 267 of their brief counsel argue that the trial court committed error in refusing each of the instructions referred to.

Requested Instruction No. 13 referred to the matter of circumstances of suspicion as being insufficient and to the necessity of establishing guilt beyond a reasonable doubt.

On the subject of reasonable doubt and the evidence required for a conviction, the trial judge in his charge used this language:

“The burden of proof in this case, as in all other criminal prosecutions, is upon the Government, and it is not necessary for a defendant to offer evidence in disproof of any allegation of the indictment until the facts proven, if unrefuted by him, are sufficient to establish his guilt. The law, in its charity, presumes the innocence of a defendant, and that presumption abides with him throughout the trial and until his guilt is established by the evidence. Before a conviction may be had it is incumbent upon the Government to prove the guilt of a defendant by evidence which, as I have heretofore stated, satisfies the minds of the jury beyond a reasonable doubt, and that means by evidence which satisfies their minds to a

moral certainty, and which accords with their reason and judgment to an extent which would induce them to act in the important affairs of life. As a great jurist has well expressed it, a reasonable doubt arises when the jury, after a fair and impartial consideration of all the evidence in the case, are unable to say that they feel an abiding conviction to a moral certainty of the truth of the charge; a certainty which satisfies the reason and directs the understanding of those who are bound to act conscientiously upon it. If, therefore, after a full consideration of the evidence presented, the jury are conscientiously able to say that they entertain such a doubt as to the guilt of the defendant under any count of this indictment, they must resolve that doubt in his favor by an acquittal as to such count; and of course if you entertain such doubt as to all the counts, then you should acquit him on all. This applies to the jury as a whole and to each member of it, since in a criminal case the verdict must be unanimous; and this degree of proof must obtain as to each independent fact or circumstance relied upon to show guilt; that is, each essential fact or circumstance in a chain necessary to establish guilt must be sustained to the same degree of certainty, since a chain is truly said to be no stronger than its weakest link.

And where circumstantial evidence is relied upon in whole or in part for a conviction, such circumstances should not only be in harmony with the guilt of the accused, but they must be such that they cannot reasonably be true in the ordinary course of things and the defendant be innocent."

The case before the jury being a criminal case and the rule governing such cases being fully and fairly stated and with extreme regard to the rights

of the defendant, there was no occasion for confusing the jury by stating to them what the rule might be in a civil case—one not before them.

XII.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING REQUESTED INSTRUCTIONS NUMBERED 22 AND 23 (REC. 448) AND 24 (REC. 449).

At pages 268 to 271 counsel for plaintiff in error argue that the trial court committed prejudicial error in refusing the several instructions above indicated. The several instructions related to the subject of circumstantial evidence. In so far as the matter embraced in them was proper for the guidance of the jury, the law was correctly given to the jury in the portion of the charge quoted by us in the next preceding subdivision of this argument.

XIII.

THE COURT COMMITTED NO ERROR IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION NO. 115 (REC. 468), OR INSTRUCTION NO. 96 (REC. 460).

Counsel argue on pages 272-278 that the trial court erred in the refusal of the instructions above indicated. The contention is without merit. Both instructions refer to the question of specific intent on the part of the defendant in connection with the transportation from Sacramento to Reno. With

reference to the subject of specific intent the trial court used this language:

“You will observe that in each count of the indictment the specific purpose and intent of the defendant in committing the particular criminal act therein charged is alleged. The existence of this intent at the time of committing any of the acts charged is made essential under the statute to constitute an offense, that is, that the act be committed to accomplish the immoral purpose denounced, since there must exist a union of act and intent. It is therefore essential to the guilt of the defendant under any one of these counts that you find the existence of this intent at the initiation of any such act. That is one of the substantive elements necessary to constitute a violation of the law in question. The intent need not, however, be formed for any fixed period of time before the act is committed. It is sufficient if it coexists with the commission of the act.”

Testimony showing the facts and circumstances and the conduct of the defendant from which the jury might find the specific intent has been so fully set out in the preceding pages that we forbear any reference to the same at this point.

XIV.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING THE SEVERAL INSTRUCTIONS SET OUT IN SUBDIVISION XIII OF THEIR ARGUMENT AT PAGES 279 TO 297.

At the pages indicated counsel discuss the proposition thus stated:

“The trial court erred in refusing to give at least some of the several instructions requested

on behalf of the defendant relating to the question of the specific intent denounced 'by the White-Slave Traffic Act'."

At page 279 counsel say:

"We state frankly that we did not expect the trial court to give all of the instructions requested on the subject of the intent and purpose of the defendant."

The matter of the specific intent was so fully and carefully covered by the trial judge in his charge and the facts from which the specific intent might be found by the jury have been so fully set out in the preceding pages that we forbear any discussion of the matter set out by counsel for plaintiff in error in Subdivision XIII of their argument at pages 279 to 297.

XV.

THE TRIAL COURT DID NOT OVERLOOK THE ONLY ISSUE INVOLVED IN THE CASE PRESENTED TO THE JURY FOR THEIR CONSIDERATION.

At pages 298 to 314 counsel discuss the proposition stated in this language in Subdivision XIV of their brief:

"The only issue involved in the indictment escaped the attention of the trial court. This issue was also the only issue in the evidence. The whole charge of the trial court to the jury was for this reason misleading and erroneous and the jury was blinded as to the real issue. By reason of this, therefore, defendant failed to receive a fair and impartial trial."

The argument contained in this subdivision of the brief of counsel for plaintiff in error might probably be left to fall of its own weight. However, so much importance is attached to it by adverse counsel that we call attention to the record for the purpose of showing how absolutely without foundation is the position taken by plaintiff in error.

The first count of the indictment on which the defendant was found guilty is shown on page 2 of the record. It charges that

“F. Drew Caminetti, * * * at Sacramento, in the State and Northern District of California, then and there being, did then and there willfully, knowingly and feloniously, unlawfully transport and cause to be transported and aid and assist in obtaining transportation for and in transporting in interstate commerce from Sacramento * * * to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific Company, a certain girl, to wit, *one Lola Norris, for the purpose of debauchery and for an immoral purpose, to wit, that the afore-said Lola Norris should be and become the concubine and mistress of the said defendant.*”

In the initial portion of the charge the trial judge called attention to the provisions of the White Slave Traffic Act and the several offenses therein and thereby denounced (Rec. 425-429). This portion of the charge is also set out in pp. 23-29 of this brief).

“That act, so far as here involved, provides in substance, that any person who shall knowingly transport or cause to be transported or aid or assist in obtaining transportation for, or in transporting in interstate commerce, any

woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral purpose * * * shall be deemed guilty of felony."

On page 27 of this brief the following language of the charge is shown:

"The indictment in this case is framed in four separate counts, which you will find to cover and include the several acts denounced in the statute, as I have outlined it above, and charges the acts of the defendant as having relation to two different women or girls with reference to whom it is charged the statute has been violated by such acts * * * In the first count of the indictment it is charged that * * * at Sacramento, in this State, the defendant wilfully, knowingly and feloniously, unlawfully transported and caused to be transported and aided and assisted in obtaining transportation for and in transporting in interstate commerce from the City of Sacramento to Reno, in the State of Nevada, over the line of railroad of the Southern Pacific Company, *one Lola Norris for the purpose of debauchery and for an immoral purpose, to wit: that said Lola Norris should be and become the concubine and mistress of the defendant.*"

At pages 28 and 29 of this brief the following portion of the charge is shown:

"The terms concubine and mistress as implied in the counts of the indictment just read to you mean, for the purpose of this case, a woman or girl who cohabits with a man without being his wife; a paramour; that is one who lives with a man and has sexual relations

with him without being his wife; and to constitute which relationship it is not necessary that such cohabitation or living together shall continue during any fixed or definite period of time.

“The term debauchery as used in the statute and alleged in the indictment may be best understood by first ascertaining the meaning of the verb. To debauch is to lead away from purity; to corrupt in character or morals; to pollute; to seduce from paths of virtue; a man debauches a woman when by insidious approach; by kind attention, rides, drives, theaters, gentle compliments, protestations of affection accompanied by caresses or like methods, he first gains her confidence and love, and then, by taking her to questionable resorts, plying her with intoxicating drinks, or other similar means, he breaks down her sense of delicacy, perverts her moral nature, and arouses her animal passions, and then seduces her to lewd actions such as illicit sexual relations or intercourse. When this result is accomplished it constitutes debauchery within the meaning of this statute.

And in this connection I instruct you that the purpose for which it is charged in this indictment the transportation of each of these girls was made, constitutes debauchery and immoral purpose within the meaning of the statute in question.”

The definitions of debauch and debauchery as given in the charge are in accord with the definitions of the same words as found in Webster's International Dictionary, as are the other words defined by the trial judge in his charge.

Bouvier's Law Dictionary thus defines concubine:

"A woman who cohabits with a man as his wife without being married."

The same term is thus defined in Webster's Dictionary:

"A woman who cohabits with a man without being his wife; a kept mistress; a woman who lives in concubinage with a man."

"Concubinage" is thus defined:

"Cohabiting of a man and woman who are not legally married; the state of being a concubine."

"Cohabit" is thus defined by the same author:

"(1) To cohabit or live in company or in the same place; (2) to dwell or live together as husband and wife."

The word "mistress" is thus defined by the same author:

(8) A woman with whom a man habitually consorts unlawfully or who occupies, wholly or partly, the position of wife to a man without being married to him; a woman living with or supported by a man as his paramour."

Definitions given by the trial judge are clearly in line with recognized definitions of the words and with the meaning of the words as popularly understood.

The uncontradicted testimony of the two girls clearly shows that the relations maintained between Caminetti and Lola Norris were those of mistress

or concubine. They certainly were cohabitating in the Reno bungalow in the manner of husband and wife. The conduct of the parties was clearly immoral and of the specific character referred to in the indictment and in the charge of the trial judge. That acts of this kind are covered by and denounced by the White Slave Traffic Act is a matter discussed by us in Subdivision III of our brief (pp. 44-73).

At pages 59 to 66 of this brief we call attention to the case of *United States v. Bitty*, reported first in 155 Fed. 938, and in the Supreme Court in 208 U. S. 393-403; 52 Law Ed. 543-547.

The lower court in that case had taken the view so stoutly maintained by the adverse counsel in the case at bar. The prosecution there was not under the White Slave Traffic Act, but under the Immigration Law. The woman there had been brought into the United States to become the concubine and mistress of the defendant.

At page 66 of our brief we quote the language of Mr. Justice Harlan, shown at 208 U. S. 403; 52 Law Ed. 547, as follows:

“We must hold that Congress intended by the words ‘or for any other immoral purpose’ to include the case of any one who imported into the United States an alien woman that she might live with him as his concubine. The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable, or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute the

importation of an alien woman, brought here that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose."

The court there reversed the judgment of the lower court.

At pages 66-72 of this brief we called attention to the case of *John Arthur Johnson v. United States of America*, determined by the United States Circuit Court of Appeals for the Seventh Circuit at the January session of 1914. That case follows the reasoning of the Bitty case. At pages 71 and 72 we called attention to the decision by District Judge Foster of the Eastern District of Louisiana, in *United States v. Flasboller*, 205 Fed. 1007. The following language was used by the judge in that case:

"The indictment sets out that the woman was persuaded to go from one state to another for the purpose of engaging in illicit intercourse, cohabitation and concubinage with the accused. Certainly illicit cohabitation and concubinage are immoral acts analogous with prostitution, and come well within the letter of the statute.
* * * In my opinion the case is on all fours with that of the *United States v. Bitty*, 208 U. S. 293, and interpretation of the statute must be controlled by that decision."

Counsel for plaintiff in error claim to find some comfort in the case of

Suslak v. United States, 213 U. S. 913.

The case, in fact, lays down no doctrine at variance with the contention made by counsel for the Government in the case at bar.

The language quoted by counsel in their brief at page 207 merely goes to the point that the word "cohabit" as used in the indictment in that case was not properly defined by the trial judge in the charge to the jury, the appellate court holding that where the pleader in the indictment used the term "cohabit" the meaning attached to that term should be such as is ordinarily given to it as a legal phrase. No such question is presented in the case at bar. The word "cohabit" is not found in the indictment here before the court.

In the Suslak case there were twelve counts in the indictment. In the first count it was charged that the defendant transported the woman for the purpose of prostitution; in the second count unlawful cohabitation was designated as the purpose; in the third count debauchery; in the fourth an intent to induce plaintiff to become a prostitute; in the fifth the intent to induce her to give herself up to debauchery.

It was in discussing the use of the word "cohabitation" in the indictment that the Circuit Court of Appeals made the criticism of the charge. Of course no such question is presented in the case at bar. The term "concubine", as we have seen, involves a cohabiting or living together between people who are not married one to the other.

The definitions of terms as given by the trial judge in the case at bar are warranted by all the lexicographers. There is no question here of the pleader using the term "cohabit" and improperly

defining such term as used in the indictment. There is absolutely no merit in the position taken by counsel at pages 209 to 314 of their argument, in which this question is discussed.

XVI.

THE COURT DID NOT ERR IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION NO. 36 (REC. 451), OR REQUESTED INSTRUCTION NO. 17 (REC. 469-470), OR REQUESTED INSTRUCTION NO. 118 (REC. 470-471), NOR WAS ERROR COMMITTED BY THE TRIAL COURT IN PERMITTING THE WITNESS, W. E. DOAN, TO TESTIFY TO STATEMENTS MADE BY THE DEFENDANT AND BY LOLA NORRIS WHILE ON THE TRAIN RETURNING TO SACRAMENTO.

At pages 315-317 counsel for plaintiff in error discuss the proposition thus stated:

“The trial court erred in refusing to give the following instructions requested on behalf of the defendant,”

reciting at pages 315 and 316 the instructions on the subject of alleged confessions and admissions by the accused and advising the jury that such testimony should be received with great caution.

At pages 329 to 345 counsel discuss the proposition thus stated:

“The trial court erred in permitting the witness, W. E. Doan, official shorthand reporter of the Superior Court of Sacramento, to testify to certain admissions made by the defendant and by Lola Norris.”

Both subdivisions of the brief, XV and XXI, relate to practically the same question and the main argument is directed at the action of the trial court in admitting the testimony of the shorthand reporter as to self-disserving statements made by the defendant Caminetti and declarations made by Lola Norris in his presence on the train upon which the parties returned from Reno to Sacramento.

The general rule on the subject of admissions and disserving declarations is thus stated in *2 Am. & Eng. Enc. of Law and Practice*:

“The most common exception to the general rule excluding declarations as hearsay evidence is to be found in the admissibility of admissions or declarations against interest made by a party to a cause. The character of this exception is self-evident, for it is reasonable to assume that no person of sound mind will make a concession against his interest unless it be founded in absolute truth. There is no material distinction so far as legal effect is concerned between an admission, which is the conceding of the truth of a statement made by another, and the disserving declaration, which is a statement made by the party against whom it operates, except in the weight to be given it as evidence. The former is weaker, because it involves the proof of the statement made, together with all the facts and circumstances tending to show that its truth was admitted; while the latter may afford evidence of the highest character, proof of the declaration alone being necessary. *As a general rule the admissions or disserving declarations of a party to the record whenever, wherever, however, or to whomsoever made, are receivable against him both in civil and in criminal cases.*”

Among the cases cited to sustain the doctrine is *Hardy v. United States*, 186 U. S. 224-230; 46 Law Ed. 1137-1140.

In that case the accused had voluntarily made statements before and after his preliminary examination. On the trial these statements were offered in evidence against him. One of the grounds relied on for the reversal of the judgment was that the court had committed error in allowing the introduction in evidence of these statements. Speaking of this question, Mr. Justice Brewer said:

“Finally, it is insisted that the court erred in permitting the government to introduce in evidence a statement made by the defendant to one R. H. Whipple, United States commissioner, before whom the preliminary examination was had—a statement reduced to writing and signed by the defendant. Sections 307 to 311 inclusive of chap. 429 (30 Stat. at L. 1319) are relied upon to sustain this assignment of error. Those sections provide that on a preliminary examination, after the government’s witnesses have been examined, the magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him, that the statement is designed to enable him, if he sees fit, to answer the charge and explain the facts alleged against him, that he is at liberty to waive making a statement, and that such waiver cannot be used against him on the trial; they further provide that if he does waive his right to make a statement a memorandum thereof shall be made by the magistrate, but the fact of the waiver cannot be used at the trial; that if he chooses to make a statement the magistrate must take it in writing, propounding only certain specified ques-

tions; that his answer to each of the questions must be read as taken down, and he given liberty to make any corrections that he desires, and that such statement, so reduced to writing, must be authenticated in the following form: It must set forth that the defendant was informed of his rights in respect to making or waiving a statement; it need not contain the questions, but must contain the answers, with the corrections or additions made by the defendant, it may be signed by him, but if he refuses to sign his reason therefor must be stated, as he gives it; and the whole must be signed and certified by the magistrate. The magistrate testified that before the preliminary examination was commenced the defendant voluntarily and without any suggestion insisted upon making a statement. Whereupon he, the magistrate, informed him that he was entitled to counsel, that he was under no obligations and need not make any statement, but that if he did it would be used against him on the trial, and also that if he waited an opportunity would be given to him to make a statement at the proper time; that notwithstanding this he insisted on making a statement, and it was then reduced to writing by the clerk of the court and signed and sworn to by the defendant; that after the examination had commenced and the testimony of witnesses for the government had been taken the statutory questions were put to him, and he was advised that he could then make a statement if he desired, but he refused to say anything. Upon this showing the statement was admitted in evidence. The magistrate also testified that after the examination was over and the defendant had been placed in jail the latter sent word that he wanted to talk with him about the case, and in an interview stated orally that his former statement was untrue, and volunteered a different account of the transactions. There was no con-

tradiction of the testimony as to the circumstances under which these two statements—one written and the other oral—were made, except that in reference to the last statement defendant, when on the witness stand, testified that the magistrate ‘came up to the jail and ordered me to return to his office for the purpose of securing some information to arrest some other fellows, or get some points of me or other parties’. From this testimony it clearly appears that *the statements were not made pending the examination or under the provisions of the statute, but voluntarily one before and the other after the examination*; that the provision of the statute as to giving him notice pending the examination was complied with, and that at that time he declined to make any statement. So the question is *whether voluntary statements made by a defendant, before and after a preliminary examination are inadmissible in evidence because made to the magistrate who in fact conducted the preliminary examination. We know of no rule of evidence which excludes such testimony.* Of course, statements which are obtained by coercion or threat or promise will be subject to objection. *Bram v. United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183. But, so far from anything of that kind appearing, the defendant was cautioned that he was under no obligations to make a statement; that it would be used against him if he made one, and that there was a proper time for him to make one if he so desired. Without even a suggestion, he insisted on making, prior to the examination, a statement which was reduced to writnig and by him signed and sworn to, and after the examination was over and he had been placed in jail, he had an interview with the magistrate and volunteered a further statement. Affirmatively and fully it appears that all that he said in the matter was said voluntarily, without any inducement or

influence of any kind being brought to bear upon him. Indeed, it is not claimed by counsel that there was any improper influence, his contention being only that the provisions of the statute with respect to a statement pending an examination were not complied with in respect to these statements. *The statements were properly admitted in evidence.*”

A case frequently cited, which justifies the admission in evidence of testimony showing admissions by an accused while under restraint or imprisonment is

Sparf v. United States, 156 U. S. 51; 39 Law Ed. 343.

Mr. Justice Harlan there used this language:

(344) “At the trial, Captain Sodergren, a witness for the government, was asked whether or not after the 13th day of January and before reaching Tahiti—which was more than one thousand miles from the locality of the alleged murder—he had any conversation with the defendant Hansen about the killing of Fitzgerald. This question having been answered by the witness in the affirmative, he was fully examined as to the circumstances under which the conversation was held. He said among other things that no one was present but Hansen and himself. Being asked to repeat the conversation referred to, the accused by the counsel who had been appointed by the court to represent them objected to the question as ‘irrelevant, immaterial and incompetent, and upon the ground that any statement made by Hansen was not and could not be voluntary’. The objection was overruled, and the defendants duly excepted. The witness then stated what Hansen had said to him. The evidence tended strongly to show that Fitzgerald was

murdered pursuant to a plan formed between St. Clair, Sparf, and Hansen; that all three actively participated in the murder; and that the crime was committed under the most revolting circumstances.

Thomas Green and Edward Larsen, two of the crew of the Hesper, were also witnesses for the Government. They were permitted to state what Hansen said to them during the voyage from Tahiti to San Francisco. This evidence was also objected to as irrelevant, immaterial and incompetent, and upon the further ground that the statement the accused was represented to have made was not voluntary. But the objection was overruled and an exception taken.

* * * * *

The declarations of Hansen, as detailed by Sodergren, Green and Larsen, were clearly admissible in evidence against him. There was no ground on which their exclusion could have been sustained.

* * * * *

(345) So far as the record discloses, these confessions were entirely free and voluntary, uninfluenced by any hope of reward or fear of punishment. In *Hopt v. Utah*, 110 U. S. 574, 584 (28 Law ed. 262, 266), it was said: 'While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain as observed by Baron Parke, in *Reg. v. Baldry*, 2 Den. C. C. 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. "Such a confession", said Eyre, C. B., 1 Leach, C. C. 263, "is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt,

and, therefore, it is admitted as proof of the crime to which it refers." * * *

Counsel for the accused insist that there cannot be a voluntary statement, a free open confession, while a defendant is confined and in irons under an accusation of having committed a capital offense. We have not been referred to any authority in support of that position.

* * * * *

Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises. * * * Nothing said to Hansen prior to the confession was at all calculated to put him in fear or to excite any hope of his escaping punishment by telling what he knew or witnessed or did in reference to the killing.

The declarations of Hansen after the killing, as detailed by Green and Larsen, were also admissible in evidence against Sparf, because they appear to have been made in his presence and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth."

A later case ruling on the same point is

Perovich v. United States, 205 U. S. 86; 51 Law Ed. 722-724.

At pages 723 and 724 the following is found in the opinion of Mr. Justice Brewer:

"Again it is alleged that there was error in overruling a motion made by defendant to strike out all the testimony given by a deputy marshal of conversations between him and the defendant. *As these conversations were not in-*

duced by duress, intimidation or other improper influence, but were perfectly voluntary, there is no reason why they should not have been received."

DISTINCTION BETWEEN DISSERVING DECLARATIONS AND CONFESSIONS.

In the proposed instruction and in the argument claiming error in the admission of Caminetti's declarations made on the train, counsel for plaintiff in error deal with *disserving declarations* as if they were the same thing in law as *judicial confessions of guilt*. In this position they are manifestly in error.

In 2 *Wharton's Crim. Ev.*, Sec. 622, pp. 1265-6 (10th Ed.), we find the definition of confession as follows:

"A confession as applied in criminal law, is a statement by a person, made at any time afterwards, *that he committed or participated in the commission of a crime*. And such confessions are generally divided in two classes—*judicial confessions* and *extra judicial confessions*. Judicial confessions are those made by the accused in the court trying the crime charged and generally termed plea of guilt. *Extra judicial confessions are those made by any person outside of the sitting of the court.*"

The next following section (622) dealing with confessions, as distinguished from admissions, uses this language:

"An admission is distinguished from a confession by the fact that the term 'admission' in criminal matters relates to matters of fact that do not involve a criminal intent, and a

confession is an acknowledgment of guilt. The distinction between confessions and admissions must always be maintained, from the fact that admissions are always admissible in evidence under an exception to the rule excluding hearsay evidence, provided such admissions are made against interest, while a confession must be affirmatively shown to have been made under conditions which would not induce a false statement."

The same subject is referred to in *2 Am. & Eng. Enc. of Law & Practice*, at pages 19-22. There, in speaking of admissions and declarations in criminal cases, the author says:

"There is a broad distinction between the mere admission of inculpatory facts and a confession of guilt. While confessions which are acknowledgments of guilt or declarations of agency or participation in crime are never receivable in evidence until there is satisfactory preliminary proof that they were voluntary, evidence of admissions or disserving declarations, merely tending to establish guilt is always admissible, whether they were made before or after commission of the crime, as where a murderer tells where may be found the body of his victim, the weapon used or property of the deceased, or where a thief gives information as to the location of stolen property. They are admissible when made while the accused is under arrest, although he is not informed of his rights or that his statements may be used against him, or the whole statement was not understood by the witness, and without precedent or proof that they were voluntary; and even where the other evidence shows that they were made involuntarily and under the influence of threats or promises or where induced by artifice or deception. This is not true of

confessions, proof of which can only be had after they are clearly shown to have been made voluntarily and without any fear of punishment or hope of favor or reward. And admissions are not receivable as confessions or admissions of guilt but merely as sayings from which the jury may infer guilt. Hence, admissions are never competent to prove the *corpus delicti*; and in order to be admissible they must clearly relate to the specific crime charged, imply the declarant's guilt thereof and be pertinent to some issue involved in the trial."

This distinction between declarations and admissions and confessions and the differing rules governing the introduction in evidence of the one or the other class of testimony has been frequently pointed out and acted on by our California Supreme Court.

A case frequently cited is

People v. Strong, 30 Cal. 157.

There Mr. Chief Justice Currey, in speaking of "confessions" as distinguished from "admissions", uses the following language:

(157) "At the request of the District Attorney, the court charged the jury in these words: 'You may give to the defendant's *admissions and confessions* such weight as you may deem them entitled to, judging from the circumstances under which they were given, and the motives which would naturally actuate the party giving them, and that you may, in your discretion, believe a part and disbelieve a part of such admissions and confessions.' To this the defendant's counsel excepted, and we think the exception well taken. From an examination of the evidence we have been unable

to discover anything therein which by any fair construction can be called a confession. The Attorney-General, who represents the people in this court, has not, though his attention has been called to it, undertaken to point out anything in the testimony of the witnesses even tending to prove a confession on the part of the defendant of any participation in the commission of the alleged homicide. *A confession, in criminal law, is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same.* (Bouvier's Dic. Confession.) *The word 'confessions' is not the mere equivalent of the words statements or declarations.* The defendant made statements to several of the witnesses, as they testified, respecting the departure of Holmes for San Francisco, and of their appointment to meet at that place, etc., but it is nowhere to be found in the testimony of the witnesses that he admitted or confessed to any participation in the homicide. In giving the instruction under consideration the court assumed that the defendant had made confessions. Even if the evidence had tended to prove that the defendant had in any degree admitted or confessed participation in the crime with which he stood charged, *it was for the jury to determine whether such evidence amounted to proof of the fact.* (People v. Levison, 16 Cal. 98; People v. Ah Fung, Ib. 137; People v. Carabin, 14 Cal. 438; People v. Williams, 17 Cal. 146.) In the same charge the jury were told that they might in their discretion believe a part and disbelieve a part of such admissions and confessions. We are not satisfied that this part of the charge would under any circumstances be entirely accurate and just, though it may be said to be warranted, if confessions had been made, by what the court said in The People v. Wyman, 15 Cal. 74. *The jury in the exercise of*

their discretion may determine what part of a narrative of the accused is to be believed, and what discredited, provided there are reasons for so doing."

This distinction between "admissions" and "confessions" is again recognized in the case of

People v. Parton, 49 Cal. 632.

In that case Mr. Justice McKinstry, speaking for the court, said:

(637-8) "The statement of the defendant to the witness, Sarah C. Kirby, did not constitute a 'confession', admissible only after proof that it was made voluntarily. *A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt.* (*People v. Strong*, 30 Cal. 157; 1 Greenleaf Ev. 170). An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt. The statement of the defendant objected to was, at most, an admission that he had taken improper liberties with the prosecutrix, or had with her consent attempted carnal intercourse with her. However immoral his conduct, his admission was not a confession of his guilt of the crime for which he was indicted, nor of any offense included in that crime."

2 *Wharton's Crim. Ev.*, Sec. 631, p. 1310.

In discussing the general rule as to the admissibility of confessions, the author says:

"Subject to the qualifications we have just noticed, the rule is firmly established that a free and voluntary confession either of an offense as specifically charged or of the fact

from which such offense can be inferred, whether made before or after apprehension and whether in writing or not in written words or by signs, is admissible when offered against the accused no matter *where or to whom it was made.*”

Another case in which this same doctrine is recognized is

People v. Le Roy, 65 Cal. 613.

In that case Mr. Justice Ross, speaking for the California Supreme Court, said:

(614) “The point most relied on by counsel is that the court below erroneously admitted in evidence certain statements made by defendant to the witness Lees. It is claimed that those statements were not voluntarily made, but were extorted from defendant by means of threats and promises. It is true that defendant so testified at the trial, but the testimony on the part of the prosecution was to the effect that the statements were not induced by any threats or promises, but were made freely and voluntarily. However this may be, it is sufficient answer to the point to say that the statements made by defendant, concerning which the witness for the prosecution was permitted to testify, did not constitute a ‘confession’, admissible only after proof that it was made voluntarily. *A confession is a person’s declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt.* (People v. Parton, 49 Cal. 637; People v. Strong, 30 Cal. 157; 1 Greenl., Sec. 170.) The statements of defendant given in evidence were not acknowledgments of his guilt; on the contrary, in his statements he all the time denied his guilt. The matters admitted by him, however, while not in themselves in-

volving his guilt, did, when connected with other facts, tend to prove it. But proof of such admissions is competent. Said this court in *People v. Parton*, supra: 'An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt.'

Still another case on the same proposition is

People v. Miller, 122 Cal. 86-87.

In this case the court said:

"It is contended by defendant that the *corpus delicti* in this case was either that he was editor, proprietor, or publisher of 'The Illustrated World'; that there is no proof of the *corpus delicti* except the admissions of defendant; and that it cannot be established by extrajudicial admissions or statements. Counsel's position seems to be that a confession includes more than an admission, and that if by the former the *corpus delicti* cannot be established neither can it be by the latter. We cannot regard the editorship or proprietorship of the newspaper as the *corpus delicti* in this case. The essence of the crime is the malicious publication of the libelous language and does not necessarily lie in the authorship of the article or the ownership of the press that prints it. But even if these facts enter into the question of guilt it does not follow that an admission of ownership would be a confession of the crime. The acts and admissions of the defendant tending to show that he was the proprietor, either in himself or jointly with some other person, are not confessions in legal contemplation.

The law makes a wide distinction between confessions and admissions."

Caminetti's statements made in the presence of Atkinson, the Assistant District Attorney, were not in fact intended to be confessions on his part of his guilt under the White Slave Traffic Act or confessions of guilt under any charge then pending or threatened against him under state law.

They were not *in fact* intended by him, in any sense, as confessions of guilt. They were not *in law* admissions of guilt. They were not in any sense judicial declarations. They were not made in a judicial proceeding.

CAMINETTI'S STATEMENTS, WHILE IN NO SENSE CONFESSIONS, WERE ABSOLUTELY VOLUNTARY AND MADE AFTER FULL WARNING AS TO HIS STATUS AND HIS RIGHTS.

In the case at bar the self-disserving statements or admissions made by Caminetti were clearly voluntarily made. The witness Doan, at pages 335-6 of the record, thus testified:

“This interview took place on the train. This train was between Truckee and Colfax. Before any statement was asked of the defendant at that time, Mr. Atkinson, the Assistant District Attorney, *informed him of his rights in the matter and that he need not answer unless he so desired.*”

The Assistant District Attorney told Caminetti of his official position and informed him further as follows:

(336) “The officers have warrants for you as you probably know—warrants for your arrest. You have been charged or will be charged

with possibly two offenses: one, with contributing to the dependency of Miss Norris, a girl under twenty-one years of age, and of living in a state of adultery and cohabitation with her, you being married to some one else, and also a felony charge of deserting and abandoning your children.

* * * * *

You are not obligated to make any statement about the matter. Anything you say must be said freely and voluntarily and with the knowledge on your part that anything you say can and will be used against you in the event that judicial proceedings are taken against you on these charges or any of them. You understand that, do you? A. Yes, sir."

Under the circumstances detailed and the advice given by Atkinson to Caminetti, the testimony was clearly admissible.

At pages 334 to 337 of their brief, counsel argue that the declarations or conduct of Caminetti made while under arrest and in a different proceeding than that in which the declarations or admissions were offered in evidence, was not competent evidence, and should not have been admitted. No authority is cited to sustain the argument there made by counsel for plaintiff in error. In view of the manifest evidence of their very great industry, we must assume that their lack of citation of authority was due to the fact that no such authority could be found.

As we have shown above, self-disserving statements or declarations not amounting to judicial confessions of guilt are admissible in evidence even

in cases where involuntarily made. Their weight, whether voluntary or involuntary, must be determined by the jury. As said by Chief Justice Currey in *People v. Strong*:

“Even if the evidence had tended to prove that the defendant had in any degree admitted or confessed participation in the crime of which he stood charged, *it was for the jury to determine whether such evidence amounted to proof of the fact.* * * * *The jury, in the exercise of their discretion, may determine what part of a narrative of the accused is to be believed and what discredited, provided there are reasons for so doing.*”

In what precedes, if our effort has not been in vain, we have shown that whether voluntary or not the evidence of Caminetti's statements made to Atkinson on the train was properly admitted in evidence. Under the law, even if involuntary—not being confessions—they were competent and admissible in evidence. The language of the witness Doan above quoted from the record shows beyond all question that the statements made by Caminetti were *voluntarily made by him after being fully warned of his position and of his rights.* In any event, Caminetti did not make those statements as a confession of guilt, either under the White Slave Traffic Act or under any proceeding pending in the State court. *In fact*, Caminetti did not intend his statements to be a confession of guilt. *In law* the statements did not constitute a judicial confession of guilt.

DISTINCTION BETWEEN JUDICIAL AND EXTRAJUDICIAL DECLARATIONS OR ADMISSIONS.

Lacking better support for the impossible position assumed by them on this question, counsel for plaintiff in error have called to their aid Sec. 1324 of the Penal Code of California. That statute avails them nothing. On its face the section deals only with *witnesses* who have made judicial as distinguished from extrajudicial utterances. The title of the statute (Stats. 1911, p. 482) is in this language:

“An act to add a new section to the Penal Code to be numbered Section 1324, relating to *the testimony of witness refusing to answer* on the ground that such answer will incriminate him.”

In its title and in its body and substance the statute deals only with *witnesses*. Who are witnesses as that term is understood in the several codes of the State of California? Section 1878 of the Code of Civil Procedure thus defines “witness”:

“A witness is a person whose *declaration under oath* is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.”

Caminetti was not under oath. His examination was not in a judicial proceeding. His statements were not made under oath on oral examination or by deposition or by affidavit.

At this point we desire to recall the court's attention to the language of Mr. Justice Brewer in the *Hardy* case (*supra*), when speaking of the

extrajudicial statements made by a prisoner before the very official who between the several statements of the prisoner, had conducted the official preliminary examination of the accused.

After speaking of the circumstances under which the several statements other than the official statements were made, the justice said:

“From this testimony it clearly appears that the statements were not made pending the examination or under the provisions of the statute, but voluntarily, one before and the other after, the examination; * * * so the question is whether voluntary statements made by a defendant before and after a preliminary examination are inadmissible in evidence because made to the magistrate who in fact conducted the preliminary examination. *We know of no rule of evidence which excludes such testimony.*”

We again ask attention to the language of *Wharton's Criminal Evidence*, p. 1266:

“Judicial confessions are those made by the accused *in the court trying the crime charged*, generally termed plea of guilt. Extrajudicial confessions are those made by any person *outside of the sitting of the court.*”

The Penal Code section relied upon by counsel deals with a *witness* who has

“offended against any of the provisions of this code, or against any law of this State.”

The section does not purport to deal with an accused who, away from the witness stand, or from any authorized legal proceeding, sees fit to make

disserving statements which subsequently may be grouped with other matters in effecting a proper condition of the testimony to afford the jury a ground for an inference of guilt or of guilty intent. If, instead of making his statements voluntarily before Atkinson, he had made the same statements before John Smith or Thomas Jones, either Smith or Jones might have been placed on the stand to prove them.

Sec. 1324 would not preclude the testimony of either Smith or Jones.

Caminetti did not demand that he be excused from testifying before Atkinson. He neither testified nor was he requested to testify before Atkinson. He was neither sworn nor asked to be sworn. He was not on that occasion a *witness*. No *testimony given by Caminetti* before Atkinson was offered before Judge Van Fleet. No question is here presented under Sec. 1324 of the Penal Code of any exemption of Caminetti from an indictment under the White Slave Traffic Act on account of any testimony given before Atkinson.

At pages 338-9 of their brief, counsel italicize the following language of Sec. 1324:

“Any person shall be deemed to have asked to be excused from testifying or producing evidence, documentary or otherwise, under this section, unless before any testimony is given or evidence, documentary or otherwise is produced *by such a witness, a judge, foreman, or other person presiding at such trial, hear-*

ing, proceeding or investigation, shall distinctly read this section of this code to such witness."

The obvious answer to any argument based on the language thus quoted is that here we have *no witness; no person testifying; no testimony given; no trial; no hearing; no proceeding or investigation* at which the presiding officer was required under Sec. 1324 to read that section of the code to the witness giving such testimony.

The section in question is not aimed at extrajudicial declarations or admissions. It does not cover *extrajudicial confessions* made by any person "outside of the sitting of the court" (*Wharton's Cr. Ev.*, 622). Its purpose is to reach judicial confessions or declarations made by the accused in the court trying the crime charged. But if the statute, by any possibility of the imagination, could be held to cover the declarations here in question as competent evidence in the courts of the United States, we should say the statute would be a mere *brutum fulmen*. It must become as if it were not, in the face of a federal jury in a federal court trying a crime against the United States.

CAUTIONARY INSTRUCTIONS AS TO THE WEIGHT TO BE GIVEN EVIDENCE OF SELF-DISSERVING OR INCRIMINATING STATEMENTS.

Plaintiff in error complains that the unquestioned testimony as to the actual statements made by him before Assistant District Attorney Atkinson should be received with caution. In this, as

in their several other positions, with reference to this matter, counsel are in error. The reason for the caution sometimes exercised in connection with these matters is that there may be no question as to whether the statements attributed to the accused were voluntarily made or whether they were given under some promise of immunity, or made under circumstances wherein the statement as actually made by the witness was not entitled to credit. But if the statement was voluntarily made, if it was not made under any threat, under any coercion, under any promise of immunity, if the statement was actually made by a free agent, there is no reason why such statement, if clearly brought home to him, should be received with caution. In this connection we recall the attention of the court to the language of Mr. Justice Harlan in *Sparf v. United States*, 156 U. S. 51; 59 Law Ed. 343:

“While some of the adjudicated cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke * * * that the rule against their admissibility has been sometimes carried too far and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. *A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such confession * * * is deserving of the highest credit because it is presumed to flow from the strongest sense of guilt and therefore it is admitted as proof of the crime to which it refers.*”

With reference to this question we find the following laid down in *11 Encyc. Pleading & Practice*, p. 333:

“In regard to instructions as to verbal admissions and confessions, there is much conflict of authority, but the weight of authority, it is believed, is to the effect that the trial court should not make any statement which will tend to disparage the value of such evidence. Accordingly it has been held erroneous to charge in substance or effect the rule laid down by Greenleaf expressing the necessity for caution as to evidence of admissions of parties, and the reason for such caution. The view taken by these decisions is that the statements made by Mr. Greenleaf are to be regarded as matters of argument rather than rules of evidence having the force of law; that while it is a matter of common knowledge that such evidence is liable to be erroneous, and for that reason it should be received with caution, yet such conclusion is only an inference of fact which must be made by the jury and not a presumption or a conclusion of law to be declared by the court.”

In support of the doctrine of the text, the author cites cases from Arkansas, California (*Kaufman v. Maier*, 94 Cal. 269), Illinois, Indiana, Montana, Texas and Washington.

An examination of the cases civil and criminal, cited by the author from the seven states above named in the footnote, fully sustain the doctrine of the text.

In any case the giving or refusing of a cautionary instruction is a matter which must depend largely upon the discretion of the trial judge. There was nothing in the circumstances attending the statements made by Caminetti in the presence of Atkinson to necessitate the giving of any cautionary or warning instruction by the trial judge to the jury in the case here before the court. The position of counsel for plaintiff in error with reference to the refused instructions and to the alleged error of the trial court in admitting the testimony of the shorthand reporter Doan, is absolutely without merit.

Of like unworth as affording a foundation for the contention of counsel here made, is Sec. 860 of the Revised Statutes, quoted by them at page 344 of their brief. As counsel admit, that section was repealed in 1910. Furthermore, the statements made by Caminetti before Atkinson, were not in the course of a judicial proceeding, as we have abundantly shown in the preceding pages.

STATEMENTS OF LOLA NORRIS IN CAMINETTI'S PRESENCE AND HIS CONDUCT WITH REFERENCE THERETO.

In this subdivision of our argument the discussion has been confined to Caminetti's own statements. The principle involved and discussed covers likewise the statements of Lola Norris made in his presence and his conduct in reference thereto. The action of the trial judge in admitting her statements requires no separate discussion.

XVII.

THE COURT COMMITTED NO ERROR IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION NO. 114 SHOWN IN THE RECORD AT FOLIO 468.

At page 318 of subdivision XVI of their argument, counsel complain of the action of the trial court in refusing an instruction to the jury that they were not to be influenced by the fact that Maury I. Diggs in another case might or might not be guilty. There was no occasion for giving any such instruction. The court directed the attention of the jury properly to the facts which were under consideration before them and instructed them that they were only to find the defendant guilty as to all or any of the counts in case his guilt was established to a moral certainty and beyond all reasonable doubt. The matters properly before the jury were distinctly called to their attention in the charge of the trial judge and the rights of the defendant were fully, clearly and properly stated.

XVIII.

THE TRIAL COURT COMMITTED NO ERROR IN THE PARTICULARS POINTED OUT IN SUBDIVISIONS XVII, XVIII, XIX AND XX.

At pages 320-321 counsel discuss the alleged error of the trial court in charging the jury as follows:

“As I have indicated to counsel in passing upon the defendant's motion to instruct the jury to acquit, the evidence introduced before

you by the government, if believed by you, is sufficient in its legal aspect, that is in law, to make a case against the defendant under each one of these counts.”

The matter covered by this portion of the charge of the trial judge in our opinion has been abundantly covered in Subdivision VII of this argument, at pages 112 to 149. We shall not prolong the argument by repeating the suggestions there made.

At page 322 of Subdivision XVIII of their argument, counsel for plaintiff in error complain of the action of the trial judge in refusing the following instruction:

“I further instruct you that where a statement or declaration of one conspirator made after the consummation of the conspiracy or the commission of the crime, is competent against the other, it must not only appear that they were uttered in his presence, but it must further also appear that the circumstances must have been such as to call for a denial by the accused, or give him an opportunity to make such denial.”

The instruction as requested did not correctly state the law. The general rule on the subject is thus stated in 2 *Wharton's Crim. Ev.*, Sec. 698, pp. 1430-1432:

“The general rule is that admissions are only admissible against the party who makes them. But where several persons are proved to have combined for the same unlawful purpose, any act done by one of the party in pursuance of the concerted plan, with reference to the crime charged, is the act of all, and proof of such act

is evidence against any and all of the others who are engaged in the same conspiracy. When once a conspiracy or combination is established, *the act or declaration of one conspirator or accomplice in the prosecution of the enterprise, is considered the act or declaration of all and therefore imputable to all. All are deemed to assent to or command what is said or done by any one in furtherance of the common object.* But the competency of the evidence of such admission is determined by the fact that the conspiracy or combination existed. Hence, a foundation must first be laid by other evidence, *by proof sufficient in the opinion of the court to establish prima facie the fact of conspiracy between the parties.* Where the evidence is sufficient in the opinion of the court to establish the prima facie case, then it is admitted, and it is for the jury to say from all the evidence and the instructions of the court whether or not the conspiracy existed."

The proposition of law is so well established that we forbear the citation of further authority upon the point.

The facts before the court which have been abundantly discussed in the preceding subdivisions of this argument, clearly establish the existence of a criminal conspiracy of lust as between Caminetti and Diggs.

Under Subdivision XIX of their argument, at pages 323-325, counsel discuss the alleged error of the trial court in admitting certain testimony there set out with reference to the conduct of Diggs and Caminetti in the Riverside Hotel in Reno. The admission of this testimony is covered by the same

general principle stated by Wharton in the quotation just above set forth. Further discussion thereof is unnecessary.

At pages 326 to 328 of their brief, counsel discuss the proposition stated in this language:

“The trial judge erred in his rulings that the prosecution amounted practically to one for a conspiracy.”

In our opinion there is no merit in the claim. The matter of conspiracy and the language of the trial judge used with reference thereto are sufficiently covered by the language above quoted from *Wharton's Criminal Evidence*. Of course, Wharton's language as quoted by us from the text is abundantly sustained by the authorities cited in the footnotes to the section (Sec. 698, 2 *Wharton Cr. Ev.*).

Subdivision XXI of the brief of plaintiff in error has been discussed by us in a preceding subdivision of this argument in connection with Subdivision XV of that brief.

XIX.

THE TRIAL COURT DID NOT ERR IN REFUSING TO PERMIT COUNSEL FOR DEFENDANT TO READ TO THE JURY PORTIONS OF THE WHITE SLAVE TRAFFIC ACT OR THE INDICTMENT UNDER WHICH DEFENDANT WAS BEING TRIED.

In Subdivision XXII of their argument counsel for plaintiff in error at pages 346 to 355b, discuss the proposition stated in this language:

“The trial court erred in refusing to permit the attorney for defendant, in his opening statement to the jury, to read those portions of the ‘White Slave Traffic Act’ under which the defendant was indicted and was then on trial, and in refusing to permit the indictment to be read to the jury and in making prejudicial remarks in his rulings in that connection.”

The prejudicial remarks referred to by counsel are the suggestion by the trial judge that he should confine himself in his statement or argument to the jury to the *facts* and leave the presentation of the *law* to the jury in the hands of the court, as well as the statement to them of the issues involved under the indictment.

Defendant’s counsel at all times during the trial persisted in the attitude that the views of the trial judge as to the sufficiency of the indictment and the amenability of the defendant to punishment under the White Slave Traffic Act were not in accord with well established views of the law and rulings of other courts in that regard. Whatever merit there may have been in the views of the trial judge they were the only views which by any possibility could be regarded by the jury in passing on the questions of fact submitted to them for determination. In the trial of a jury case the *facts* are for the jurors and the *law* for the judge, with considerable latitude allowed in federal courts to the expression by the trial judge of his opinion as to facts.

In the earlier days of the administration of criminal law in the United States courts, claim was frequently made that jurors had a right to pass upon the law as well as upon the facts. That theory was long ago judicially repudiated. The subject was referred to by Circuit Justice Story in

United States v. Battiste, Fed. Cas. No. 14545.

He there said:

(1043) "Before I proceed to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue.

* * * * *

"But I deny, that, in any case, civil or criminal they have the moral right to decide the law, according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which dif-

ferent juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain, what the law, as settled by the jury, actually was. On the contrary, if the court should err, in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. *Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.* If I thought, that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion."

A well written note on this subject is shown in 1 Am. St. Rep. at page 54 following the California case there cited: *Sullivan v. Royer*, 72 Cal. 428:

"Jury Trial.—Where the distinct provinces of the court and of the jury are recognized, and the former is held to be the exclusive judge of the law, as the jury are of the facts, *it is clearly improper for counsel to argue questions of law to the jury, or to read law books or extracts therefrom in the course of their argument.* In

the first place, such a course savors of disrespect to the judge on the bench, as it suggests to the jury that there are other exponents of the law to whom they may look in making their decision, and invites them to accept the law as read by the attorney, rather than as set forth in the instructions which the court is to give to them before they retire for deliberation. In the next place, whenever the jury is to be influenced by something which is stated to them and in their presence, as law applicable to the case, it ought to be in the form of instructions to which the opposing party may, if he so wish, reserve an exception. Otherwise, he is without redress, if that which is stated as law is, in truth, not the law at all; or if, though being sound law when properly applied, it is entirely inapplicable to the case under consideration. Besides, the reading of law books in the course of an argument must tend to confuse as well as mislead the jury. It distracts their attention from the facts of the case. The reading of such books may be permitted in the discretion of the court, if pertinent, by way of illustration; but, if its apparent object is 'to induce the jury to disregard the instructions, or to take the law of the case from the books rather than from the court', it should be checked by the judge, unless perhaps in those cases where the jurors are judges of the law as well as of the facts: Proffatt on Jury Trials, sec. 253; *People v. Anderson*, 44 Cal. 70."

In 1 *Thompson on Trials*, Sec. 942, p. 783, the rule is thus stated:

"In the courts of the United States and in the courts of most of the states, it is settled that counsel cannot be permitted to argue to the jury questions of law which have been decided by the court. Juries have no power to

judge of the constitutionality of acts of the legislature, and counsel consequently have no right to argue such questions to them."

In *Proffatt on Jury Trials*, Sec. 251, the matter of the reading of law authorities to the jury in argument is thus referred to:

"In regard to the practice it is said in a California case that the *practice of allowing counsel in either a civil or criminal action to read law to the jury is objectionable and ought not to be tolerated.*"

In Sec. 253, in speaking of argument on law, Proffatt uses this language:

"Whether an argument on the law of the case can be made to the jury is very much doubted. It ought not to be permitted when the court is asked for a statement of the law and gives it to the jury as authoritative. And the court may rightly prevent the counsel for the defense from arguing the constitutionality of a law to the jury. * * * A court can always interfere and stop a counsel in an argument of law to the jury when its own opinion is fixed; and in that case it may refuse to allow any argument."

In this connection we ask attention to the following cases:

U. S. v. Morris, Fed. Cas. No. 15815;
U. S. v. Riley, 5 Blatch. 204, Fed. Cas. 16164;
People v. Carty, 77 Cal. 213-216;
People v. Anderson, 44 Cal. 70;
Sullivan v. Royer, 72 Cal. 251; 1 Am. St. Rep. 51.

Abundance of additional authority might be called to the attention of the court in this connection, but enough is above shown to establish the proposition stated in Sec. 942, *Thompson on Trials*, that:

“In the courts of the United States and in the courts of most of the states, it is settled that counsel cannot be permitted to argue to the jury questions of law which have been decided by the court.”

Defendant's counsel had no more right to comment on the terms of the indictment or to call the same directly to the attention of the jury than they had to state the law to the jury.

The indictment and its several counts were fully, clearly and intelligently called to the attention of the jurors by the trial judge. If by any possibility it could be claimed that there was error in refusing to permit defendant's counsel to read the indictment to the jury, it could not be regarded as prejudicial error because later the language of the indictment was clearly stated to the jury.

XX.

THE TRIAL COURT COMMITTED NO ERROR IN PERMITTING THE COMMENTS OF COUNSEL FOR THE GOVERNMENT WITH REFERENCE TO ALLEGED CONDUCT OF CAMINETTI WITH GIRLS OTHER THAN LOLA NORRIS AND MARSHA WARRINGTON.

At page 356 to 362 in Subdivision XXIII of their argument, counsel for plaintiff in error urge this proposition upon the court:

“The trial court erred in its rulings and in its comments, and the prosecuting attorneys likewise erred in the questions propounded and the comments made by them with reference to the alleged conduct of the defendant Caminetti with certain girls other than Lola Norris and Marsha Warrington.”

This subject matter is discussed in Subdivision VII of this brief at pages 172 to 176. The portions of the record involved and the action of counsel with reference thereto, in our judgment are sufficiently discussed in those pages of this brief.

At page 362, under this head, adverse counsel say:

“In the previous portion of this opening brief, in the sixth subdivision thereof, we pointed out that, in a prosecution of the character involved in the case at bar, it is not permissible to permit evidence of the misconduct of the defendant with females other than the one with reference to which he is charged.”

The question of law thus suggested to the attention of the court is referred to by us and the authorities cited on preceding page 145 of this argument in Subdivision VI. Further reference to the matter discussed in Subdivision XXIII of defendant's argument is, in our judgment, not necessary.

XXI.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING TO PERMIT THE DEFENDANT TO TESTIFY THAT HE HAD NEVER READ THE WHITE SLAVE TRAFFIC ACT.

The alleged error in this regard is discussed by defendant's counsel at pages 363-4. All human

experience attests that the vast majority of men who have committed crimes have never read the criminal statutes under which they were tried, convicted and punished. *Ignorantia legis neminem excusat*. Neither discussion nor citation of authority is required to justify the action of the trial judge in the matter here criticized.

XXII.

THE TRIAL COURT COMMITTED NO ERROR IN ANY OF THE PARTICULARS ASSIGNED BY COUNSEL FOR PLAINTIFF IN ERROR IN SUBDIVISIONS OF THEIR BRIEF NUMBERED XXV, XXVI, XXVII, XXVIII, XXIX, XXX AND XXXI.

The matters noted at pages 365 to 369 under Subdivision XXV of the brief of plaintiff in error refer to the conduct of some of the conspirators under the criminal conspiracy of lust—a conspiracy which is clearly shown. The matters therein discussed all had evidentiary value for the purpose of establishing the criminal intent with which Lola Norris and Marsha Warrington were transported in interstate commerce to Reno, Nevada.

The matter of criminal conspiracy and the acts and declarations of the conspirators in connection therewith, have been sufficiently discussed in preceding pages.

The matters discussed by adverse counsel in Subdivision XXVI of their argument, pages 370-372, refer to conversations and declarations occurring

otherwise than in the presence of Caminetti. This matter has already received sufficient attention in the presentation of our views on the subject of conspiracy.

At page 373 counsel discuss refusal of the trial court to permit testimony as to the condition of Marsha Warrington when told of the publication in the Sacramento Bee newspaper. The matter thus involved is of infinitesimal consequence, and could in no sense be prejudicial error and requires no discussion.

The same comment applies to the matter discussed at page 374 by defendant's counsel under Subdivision XXVIII of their argument. Also to the matter discussed at page 375 of Subdivision XXIX, and to the matters discussed at pages 376-7 under Subdivision XXX.

The matter considered under Subdivision XXXI at page 378 affords no reasonable ground for discussion. The purchase of the railroad tickets by Maury I. Diggs for the transportation of the four was evidently a proper matter to be considered by the jury.

XXIII.

THE TRIAL COURT COMMITTED NO ERROR IN ADMITTING THE STATEMENTS MADE BY MAURY I. DIGGS.

The record abundantly shows that Diggs and Caminetti were co-conspirators. Under such con-

ditions the acts and declarations of either in pursuance and consummation of the conspiracy, were properly admitted in evidence. The subject has been fully discussed in preceding pages and requires no further comment at this point.

XXIV.

NO PREJUDICIAL ERROR IS SHOWN IN THE MATTER DISCUSSED UNDER SUBDIVISION XXXIII OF THE BRIEF OF PLAINTIFF IN ERROR AT PAGE 382.

At pages 382 of their brief counsel criticize some remark of the trial judge. The matter as presented, without citation of authority or discussion of the circumstances, is a matter of minor consequence. No error is disclosed thereby—especially no prejudicial error.

XXV.

THE COURT COMMITTED NO ERROR IN DENYING DEFENDANT'S MOTION TO TRANSFER TRIAL OF THE CASE TO SACRAMENTO.

The cause was tried in the district wherein it was alleged in the indictment the offense had been committed. The only adjudicated case called to the attention of the court in connection with the position advanced and discussed by counsel, at pages 383 to 389 of their brief is:

People v. Powell, 87 Cal. 348.

That case affords no warrant for challenging the action of the trial judge in the case at bar. In that case, after two trials in San Mateo County, the district attorney moved to have the cause transferred for a further trial to the City and County of San Francisco. The transfer was made under Sec. 1033 of the Penal Code of the State of California. The defendant claimed that the law relied on was unconstitutional and that the transfer was in violation of his right to be tried by a jury of the vicinage in which the crime was charged to have been committed. The California Supreme Court sustained the view taken by prisoner's counsel. It in no sense presents facts parallel with those presented in the case at bar, and cannot justly be considered as an authority. The action of the trial judge in refusing to transfer to Sacramento was clearly proper. Here the case was tried by a jury in the district in which the crime was committed.

Summary.

Before closing this argument we deem it proper to suggest that a companion case is before this court for consideration—*United States v. Diggs*, No. 2404. The facts involved in both cases are substantially identical—covering the illicit relations of F. Drew Caminetti, plaintiff in error in this case, and Maury I. Diggs, with the young girls, Lola Norris and Marsha Warrngton, between October, 1912, and

March 14, 1913. The questions of law involved, with the exception of some minor matters, are identical. The cases were tried largely by the same counsel, and the oral argument in this court covered both cases. For that reason we respectfully request that in disposing of either case the views presented in the arguments of counsel in the other may be given consideration by the court.

The cases, in their earlier history, involved some notoriety and a large amount of acrimonious public discussion and comment. Counsel for plaintiffs in error in these two cases would have it appear that their clients have been made victims of an inflamed public opinion, tinctured somewhat possibly by political considerations, which in its operation became so powerful as to improperly swerve the trial judge and counsel for the government from the decorous treatment of an accused person on trial on a criminal charge.

Our only purpose in this argument is to present the facts as our lights permit us to see them and to suggest the legal principles that should be applied to them and the rules of law by which the action of all concerned may be actually, regularly and fairly determined with that degree of dignity and that exhibition of knowledge of the law which ordinarily characterize the administration of the law in the courts of the United States.

So much ground has been covered by the argument of adverse counsel that our reply has attained unusual length. For that reason we have prepared

an index to the argument showing the pages at which indicated subject matters have been considered. The action of the trial judge in commenting on the significant silence of the defendant with reference to the incidents of the Reno trip while voluntarily on the stand, and the similar comment made by counsel for the government have been made the subject of such severe, reiterated and persistent attacks that we have supplemented the authorities relied on by us in Subdivision IV of this argument with a list of cases on this subject which will be found in an addendum following this summary of our argument.

Under the facts of this record and the law of these United States we are abundantly justified in making the following claims:

1. Marsha Warrington and Lola Norris, two young women barely out of their girlhood, of good character and located in respectable Sacramento homes, unfortunately fell in the pathway of Caminetti and Diggs in the months of September and October, 1912. Diggs resolved on the conquest of Marsha Warrington and Caminetti became a willing and active instrument under his guidance, to aid him in the accomplishment of his purpose.

As early as November, 1912, Diggs had fully accomplished the ruin of the Warrington girl and established his adulterous relationship with her. Caminetti had set his desire on a similar result in the case of Lola Norris. The final accomplishment of

his set purpose was delayed until the days and nights of the sojourn in the Reno bungalow.

From October till March the two men co-operated in the accomplishment of their common design. While they may have been to some extent impelled to leave Sacramento and make the trip to Reno by other consideration, the *paramount purpose of the Reno trip was the expected or continued enjoyment of the bodies of these two young women.*

The facts, as found by the jury, show the character of guilty criminal intent denounced by the White Slave Traffic Act. The finding of the jury is conclusive here if the law be as laid down by the trial judge and as we believe it to have been authoritatively and repeatedly declared by the courts of these United States.

2. The charge of Judge Van Fleet was neither misleading nor confusing, nor did it evidence any disregard of the rights secured by the statutes and the constitution to an accused on trial.

3. The White Slave Traffic Act was an authorized exercise of legislative power by the Congress under the Commerce Clause of the Federal Constitution.

4. The accused having voluntarily taken the stand as a witness became subject to the same tests as any other witness. His actions on the Reno trip were more persuasive in establishing his purpose in making that trip than any other testimony could have been. He was silent. He refused to explain or

deny. Under the law, as administered in the American courts, his conduct was properly the subject of comment by the trial judge and equally a subject of proper comment by counsel for the government.

We ask the court to bear in mind that the additional cases on this point are shown in the addendum following this summary. We also ask the court to bear in mind that this same subject matter is discussed in the government brief filed by us in the companion case of *Diggs v. United States*, at pages

5. Lola Norris and Marsha Warrington were not in fact nor in law accomplices of Caminetti or of Diggs. Neither under the facts nor under the law was it the duty of the trial judge to declare them accomplices or to advise the jurors that their testimony should be viewed with distrust. Neither of the victims, under the law, could have been indicted, tried or punished for a violation of the White Slave Traffic Act. If, in fact or in law, they were accomplices, the refusal of the requested instruction constituted no prejudicial error. The giving of warning instructions is a matter entirely discretionary with the trial judge. The circumstances of this case afforded no warrant for the giving of such instructions in the case with reference to Marsha Warrington or Lola Norris. No jury composed of sane men could, as to the facts involved in the Reno trip, have arrived at a different verdict than that the facts of that trip were exactly and identically as disclosed by the two girls.

6. Under the facts and under the law, the court was justified in refusing to acquit. In the transportation of the two young women to Reno, in the procurement of the tickets for the trip, Caminetti was as responsible as Diggs. Diggs by his suggestion and advice was "boss" or manager of the trip. The purpose of the trip was that the two girls should be the concubines and mistresses of the two men during their proposed indefinite stay in Reno. The conduct of the two men before, during and after the trip all established the guilty purpose of the trip and the violation of the White Slave Traffic Act.

7. There was no misconduct amounting to prejudicial error in any declaration or suggestion of government counsel. As suggested by Mr. Roche during the argument, Caminetti did in fact try to "hide behind the respectability of a loyal wife", whom he had deserted when his youngest child was but three weeks old.

In all courts, federal and state, a liberal allowance is made to prosecuting officers in making their argument. An inadvertence in statement or a misapprehension or a misunderstanding of the facts as understood by others, has never been regarded in any court as a just cause for the reversal of a righteous judgment. Every statement of government counsel as to a fact or inference finds absolute justification in the testimony disclosed by this record.

8. The court committed no error in the refusal of the several instructions set out by counsel for

plaintiff in error in the several subdivisions of their argument. In so far as the instructions offered correctly stated the law, they were covered by the charge in which the law was fully, fairly and clearly stated by the trial judge.

9. The most amazing suggestion made in the briefs of counsel on behalf of both plaintiffs in error—made in the identical language in both briefs—is that Judge Van Fleet overlooked the only issue in the case, and likewise that the government counsel similarly overlooked that only issue. It seems remarkable that after all the experience of Judge Van Fleet as a trial judge, as a justice of the California Supreme Court and as District Judge in the Northern District of California, he should not, with the aid of all the counsel engaged in this case, have been able to discover what was the only issue involved. In our opinion he realized and stated clearly the issue involved and every rule of law proper to be considered by the jurors in its determination.

10. The court committed no error in admitting the testimony of Doan, the shorthand reporter, as to Caminetti's declarations and conduct on the train returning from Reno. His declarations in no sense constituted a confession of guilt under the White Slave Traffic Act. On the contrary his entire attitude was that he had been guilty of no crime whatever. He certainly made no confession of guilt. His disserving declarations as distinguished from a judicial confession, were, under recognized rules

of criminal evidence, proper to be stated before the jury, as likewise his conduct at the time when Lola Norris made the declarations in his presence.

11. The court committed no error in refusing to permit counsel for plaintiff in error to read the indictment or to read the law to the jury during the trial.

12. In our judgment the trial court committed no error during the trial. If any error be shown it is infinitesimal in character and certainly not prejudicial in effect. The verdict and judgment of the lower court in our opinion should stand as the final determination of the cause.

Dated, San Francisco,

November 28, 1914.

Respectfully submitted,

THEO. J. ROCHE,
*Special Assistant to the
Attorney General.*

JEREMIAH F. SULLIVAN,
Of Counsel.

ADDENDUM.

ADDITIONAL AUTHORITIES ON POINT THAT COURT OR COUNSEL MAY COMMENT ON SILENCE OF DEFENDANT AS A WITNESS OR HIS FAILURE TO EXPLAIN OR DENY INCRIMINATING CIRCUMSTANCES.

In view of the persistency with which the several cases decided by the Supreme Court of Missouri have been urged upon the attention of this court by plaintiff in error in the present case, and by Diggs in his brief, we ask attention to some very recent adjudications made by the Supreme Court of Missouri. As indicated by us, the Missouri decisions relied on by adverse counsel were out of line with the general trend of American authority on the subject. Since the Government's brief in the Caminetti case was set up by the printer, two Missouri cases have come to our attention which were not cited in that brief. They are the cases of

State v. Raftery, 158 S. W. 585-8 (decided by the Supreme Court of Missouri, June 28, 1913);

and

State v. Larkin, 157 S. W. 600-4 (decided by the Supreme Court of Missouri in May, 1913).

In the Raftery case the court said:

“This court has recently held in *State v. Larkin* that *counsel for the state has the right to comment on the failure of the defendant, while*

on the stand, to deny incriminating statements attributed to him by other witnesses. It is a wholesome rule, and we abide by it."

In the Larkin case the court said:

"Defendants strenuously urge that the court erred in permitting the prosecuting attorney to comment upon the failure of defendant Roy Larkin who took the stand as a witness in his own behalf, to deny certain statements which the prosecuting attorney averred had been made by him to Mrs. Harris * * * (p. 605.) We have carefully examined the statutes and holdings upon this question of more than thirty states, and we find that it has been held universally that, if the defendant is not sworn as a witness in his own behalf, any comment by the prosecuting attorney on his failure so to testify constitutes reversible error, in the absence of a peremptory and proper rebuke by the trial court. But, on the other hand, except in our own state and in California, where the question has been sometimes doubted, *the right of the prosecuting attorney to comment upon the failure of the defendant, when he takes the stand as a witness in his own behalf, to deny or explain incriminating facts and statements, has been uniformly held allowable.*"

The Missouri Supreme Court, in its opinion, calls attention to the following list of cases which, on examination, will be found to sustain the doctrine so clearly set forth in the opinion:

Solander v. State, 2 Colo. 56;
State v. Tatman, 59 Iowa 471; 13 N. W. 632;
Stover v. People, 56 N. Y. 315;
Heldt v. State, 20 Neb. 500; 30 N. W. 626; 57
 Am. Rep. 835;

Comstock v. State, 14 Neb. 205; 15 N. W. 355;

State v. Staley, 14 Minn. 118 (Gil. 75);

Cotton v. State, 87 Ala. 103; 6 So. 372;

Clarke v. State, 87 Ala. 71; 6 So. 368;

Lee v. State, 56 Ark. 4; 19 S. W. 16;

McCoy v. State, 46 Ark. 141;

Brashears v. State, 58 Md. 567;

McFadden v. State, 28 Tex. App. 241; 14 S. W. 128;

Lienburger v. State, (Tex. Cr. App.) 21 S. W. 603;

Parker v. State, 62 N. J. Law 801; 45 Atl. 1092;

State v. Harrington, 12 Nev. 125;

State v. Ulsemer, 24 Wash. 659; 64 Pac. 800;

Hanoff v. State, 37 Ohio St. 178; 41 Am. Rep. 496;

State v. Ober, 52 N. H. 459; 13 Am. Rep. 88;

State v. Glave, 51 Kan. 330; 33 Pac. 8;

Toops v. State, 92 Ind. 13;

Commonwealth v. McConnell, 162 Mass. 499; 39 N. E. 107.

The court, in its opinion, further discusses the subject in the following language:

“The rule that no reference shall be made to the neglect, failure, or even refusal of a defendant to avail himself of his right to testify shall not be commented on in the event he does not become a witness in his own behalf is therefore, we find, universal; but, on the contrary, *the rule that if he does go upon the witness stand*

he then stands in the precise attitude of any other witness is, except in this state, and, as stated, in California, where the rule is subject to some doubt, also universal. Mr. Wharton, in his learned and able work on Criminal Evidence lays down in the tenth edition thereof the rule that *such comment is allowable*; to this statement of the text he cites no exceptions, and correctly quotes the Missouri courts as entertaining like views. Wharton, Crim. Ev. (10th ed.) sec. 435a. * * * For many years, and in practically every jurisdiction in the American Union, it has been vehemently urged in perhaps more than a hundred cases that the right of the state to cross-examine a defendant who at his own request, and not otherwise, takes the stand as a witness in his own behalf, is limited by the constitutional inhibition against self-incrimination. But, without citing cases, it may be said that *this question is now well settled against the contention urged. The contention that, absent a statute such as we have, cross-examination is limited by the constitutional rule against self-incrimination, has been exploded utterly on the ground that there is sufficient protection against self-incrimination when it is provided that a defendant may or may not testify for himself, according as he may desire.* * * *

(606) Nothing is clearer, when we consider the history of this legislation, when we consider that at common law the defendant could not testify in his own behalf, and that the two sections of our statute were intended to modify the common law, and when we consider the rule that *this modification of the common law ought to go no further in its construction than its terms expressly provided, and that there is no legal or statutory prohibition against comment by the prosecuting attorney in any case, if in fact the accused does avail himself of his right to testify.*

In logic and reason it is no argument against this view that the state by an express statutory provision is precluded from cross-examination of the defendant upon any matter other than that about which he shall himself testify in his examination in chief. * * * *Other states*, as we have seen, without having in their statutes the provision that a defendant testifying for himself 'may be contradicted and impeached as any other witness in the case', have, yet with practical unanimity, held that, if a defendant avails himself of his right to testify he then stands as any other witness, and his silence in explaining and his failure to deny or contradict incriminating facts, statements, or circumstances may be fully commented on by the prosecuting attorney. It is our duty to construe our own statutes as we find them in the light of their language, intent, and logic. *There is no valid reason for the construction which has long been put by this court upon this provision of our statute. It is in absolute conflict with the rule announced by the text-writers and diametrically in conflict with the holdings of at least forty-six states in this Union on this identical question.* In Iowa, as has been noted, there is a statute making the prosecuting attorney guilty of a misdemeanor if he refers to the failure of the defendant to take the stand and testify in his own behalf, but if the defendant does take the stand, and does make himself a witness for himself, the right of comment upon the defendant's failure to deny, or contradict incriminating facts, statements or circumstances is left absolutely open to the state. *State v. Tatman, supra.* Time and again, ever since the rule announced in *State v. Graves, supra.* which is now criticised, was first enunciated, this question has been up for ruling. *It needlessly, and in the writer's view erroneously, reverses more cases than any other single point which*

we are called on to review. * * * For years subsequent to the rendition of the opinion in *State v. Graves*, supra, where the contrary doctrine to the one discussed here was first enunciated in this court, *the cognate rule above referred to of presumption arising as a matter of law from the failure of the defendant to deny incriminating facts or circumstances was fully recognized.* * * * (Citing cases.)

* * * It is difficult to see why, if such a presumption is as a matter of law entertained against a defendant when he takes the stand as a witness in his own behalf, such presumption might not be commented on by the prosecuting attorney in a case where the defendant likewise becomes a witness in his own behalf. We concede that, if there were any restrictions whatever placed upon the defendant as to the nature or extent of his testimony when he has elected to become a witness for himself, then there would be some reason in the rule. But there is no such restriction upon him. *His right to explain, deny and contradict is as unlimited as the rules of evidence, and as broad as the issues pertinent to the matter under inquiry.* In order to reach this conclusion, we must perforce read into section 5243 words that have not been placed in that section by the Legislature. We must make the first clause of that section read: 'And if the accused shall not avail himself of his * * * right to testify, on any question, point, fact or circumstance, then' etc. When we consider that the statute in question changes the common law, it is difficult to see our warrant for reading into this section words that the Legislature has not in express language placed therein. We conclude that the case of *State v. Graves*, 95 Mo. 513, 8 S. W. 739, which enunciated the rule that no comment shall be made by the prosecuting attorney or other counsel for the state on the failure of the de-

fendant to testify about or to deny or contradict any statement, fact or circumstance in the case, as well as other cases in this state which announce the same rule, following the case of State v. Graves, ought to be overruled and no longer followed in this behalf."

